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No. 11737

United States
Circuit Court of Appeals
For the Ninth Circuit.

MILO W. BEKINS and REED J. BEKINS, as
Trustees under the Last Will and Testament
of Martin Bekins, deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION
DISTRICT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED
NOV 4 - 1947

PAUL P. O'BRIEN,

No. 11737

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Turlock, Calif.

Attorneys for Appellants.

JEROME D. PETERS, ESQ.,
304 Broadway,
Chico, Calif.

Attorney for Appellee.

MANDATE OF CIRCUIT COURT
OF APPEALS

United States of America—ss.

The President of the United States of America to
the Honorable the Judges of the District Court
of the United States for the Northern District
of California, Northern Division—Greeting:

Whereas, lately in the District Court of the United States for the Northern District of California, Northern Division, before you, or some of you, in the Matter of Compton-Delevan Irrigation District, Bankrupt, No. 9870, an order was duly entered on the 19th day of September, 1944, which said order is of record and fully set out in said matter in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Milo W. Bekins and Reed J. Bekins as Trustees under the Last Will and Testament of Martin Bekins, deceased, as appellant, against Compton-Delevan Irrigation District, as appellee, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 14th day of May in the year of our Lord One Thousand Nine Hundred

and forty-five the said cause came on to be heard before the said Circuit Court of [1*] Appeals, on the said Transcript of the Record and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellants and against the appellee, and that this cause be, and hereby is remanded to the said District Court with directions to grant appellants' motion to modify the terms of the final decree.

It is further ordered, adjudged and decreed by this Court, that the appellants recover against the appellee for their costs herein expended, and have execution therefor.

(July 17, 1945.)

You, Therefore, Are Hereby Commanded, That such further proceedings be had in the said cause in accordance with the opinion and decreed of this Court and as according to right and justice and the laws of the United States ought to be had, the said notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, the 11th day of December in the year of our Lord One Thousand Nine Hundred and forty-five.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Amount of Costs Allowed and Taxed in favor of the appellants and against the appellee as per Annexed Bill of Items, Taxed in Detail: \$161.60.

PAUL P. O'BRIEN,
Clerk.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal] C. W. CALBREATH,
Clerk, District Court of the U. S.
Northern District of California.

By /s/ F. M. LAMPERT,
Deputy Clerk.

[Endorsed]: Filed Dec. 12, 1945. C. W. Calbreath, Clerk.

[Endorsed]: Filed C. C. A. Sept. 29, 1947. [1a]

In the District Court of the United States for
the Northern District of California, Northern
Division

No. 9870

(In Bankruptcy)

In the Matter of

COMPTON - DELEVAN IRRIGATION DIS-
TRICT (In Proceedings for Confirmation of
Plan of Composition of Outstanding Indebted-
ness)

ORDER GRANTING MOTION TO MODIFY
FINAL DECREE

In this matter the Mandate of the United States Circuit Court of Appeals for the Ninth Circuit having come down directing this court to grant the motion of Milo W. Bekins and Reed J. Bekins, as trustees appointed by the will of Martin Bekins, Deceased, for an order requiring the Compton-Delevan Irrigation District to pay said trustees \$2200.00 upon surrender and deposit of \$11,000 principal amount of bonds of said district, with appurtenant coupons, and to modify the terms of the final decree entered herein to extend the time for depositing said bonds and to relieve the said parties from their default, if any herein,

Now, Therefore, upon application of said movements It Is Ordered, Adjudged and Decreed that the final decree entered herein August 17, 1942 be and the same is hereby modified to extend the time

for deposit and surrender of said bonds as herein provided and that the said trustees may, within thirty (30) days [1b] after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, the petitioner herein, bonds numbers 409, 410, 411, 413, 414 and 415 of the original issue of bonds of said district, and bonds numbers R 115, R 136, R 137, R 138, and R 139 of the Refunding issue of said District, each of the par value of \$1000, together with appurtenant unpaid coupons maturing January 2, 1932 and subsequent, and upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of \$2200.00 upon said bonds and coupons with deductions for missing coupons, if any be missing, as provided in the said final decree and in the interlocutory decree heretofore entered herein, and shall also pay to said trustees the sum of \$161.60 costs taxed herein, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein.

Dated: January 25th, 1946.

/s/ MARTIN I. WELSH,

Judge U. S. District Court.

[Endorsed]: Filed Jan. 25, 1946.

[Title of District Court and Cause.]

DISAPPROVAL AS TO FORM OF ORDER
GRANTING MOTION TO MODIFY FINAL
DECREE

Comes now Compton-Delevan Irrigation District and disapproves the form of the proposed order granting motion to modify final decree, and suggesting that the same be modified by striking therefrom the words "upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein," said words appearing on Lines 16 and 17 on Page 2 of said proposed order.

Dated: January 23, 1946.

PETERS AND PETERS,
Attorneys for Compton-Delevan
Irrigation District.

[Endorsed]: Filed Jan. 24, 1946.

[Title of District Court and Cause.]

NOTICE OF LODGMENT

To Compton-Delevan Irrigation District and Jerome D. Peters and George R. Freeman, Attorneys:

You and each of you will please take notice that on or about January 19, 1946 there was lodged with the Clerk of the Above Entitled Court at the Court-house in Sacramento, California, a proposed order granting motion to modify final decree (copy of which is annexed), in duplicate and that you are required under Rule 5 (d) to approve or disapprove the same as to form as provided in said Rule.

W. COBURN COOK,

Attorney for Milo W. Bekins and Reed J. Bekins,
as trustees appointed by the will of Martin
Bekins, Deceased.

(Copy of proposed Order attached.)

Approved as to form as provided in Rule 5 (d)
January 21st, 1946.

GEORGE R. FREEMAN,

Attorney for Petitioner.

[Endorsed]: Filed Jan. 26, 1946.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDER

To Compton-Delevan Irrigation District and Jerome D. Peters, Attorney at Law, Chico, California, and George R. Freeman, Attorney at Law, Willows, California:

You and each of you, will please take notice that on January 25, 1946, the court entered an order herein granting the Motion to Modify the Final Decree, said order ending at line 18, page 2, with the words "decree herein."

Dated: February 4, 1946.

W. COBURN COOK,
Attorney for Milo W. Bekins and Reed J. Bekins,
as trustees appointed by the will of Martin
Bekins, Deceased.

January 21st, 1946.

[Endorsed]: Feb. 6, 1946.

[Title of District Court and Cause.]

APPLICATION FOR LEAVE TO SUE
IN THIS MATTER

The mandate of the United States Circuit Court of Appeals for the Ninth Circuit having come down directing this court to grant the motion of Milo W. Bekins and Reed J. Bekins, as trustees under the Last Will and Testament of Martin Bekins, Deceased, for an order requiring the Compton-Delevan Irrigation District to pay said trustees \$2200 upon surrender and deposit of \$11,000 principal amount of bonds of said district with appurtenant coupons and to modify the terms of the final decree in certain particulars, and the court did, on January 25, 1946 enter an order herein granting the said motion to modify the said final decree;

The said Order granting the motion to modify the final decree amongst other things provided that the said trustees might, within thirty days after the said order should become final, present to the Treasurer of Compton-Delevan Irrigation District bonds numbers 409, 410, 411, 413, 414 and 415 of the [8] original issue of bonds of said district, and bonds numbers R 115, R 136, R 137, R 138 and R 139 of the refunding issues of said district, at a par value of \$1000, together with appurtenant unpaid coupons maturing January 2, 1932 and subsequent, and that upon such presentation and surrender of the bonds and coupons the said Compton-Delevan Irrigation District was required to pay to

the said trustees the sum of \$2200 upon said bonds and coupons, and also was required to pay to said trustees \$161.60 costs taxed herein, or upon the failure of said Compton-Delevan Irrigation District to make such payment upon such presentation and surrender of said bonds and coupons, the said trustees should no longer be bound by the terms of the final decree or the interlocutory decree herein.

The said Milo W. Bekins and Reed J. Bekins, as trustees under the Last Will and Testament of Martin Bekins, Deceased, on February 4, 1946 served a notice of the entry of said order upon the said Compton-Delevan Irrigation District and its attorneys, and the said order granting motion to modify the final decree thereupon became final on or about March 6, 1946;

As will more particularly appear from the annexed affidavit, the said Milo W. Bekins and Reed J. Bekins, as trustees under the Last Will and Testament of Martin Bekins, Deceased, on or about the 25 day of March 1946 caused the said bonds and coupons to be presented to the Treasurer of Compton-Delevan Irrigation District for payment, surrender and cancellation as provided in said order, and that upon such presentation payment thereof was refused;

That the said bonds and coupons were thereupon deposited with the Anglo California National Bank, Chico Branch, Chico, California, located at and near the office of the Treasurer of said Compton-Delevan Irrigation District, and the said Treasurer

was notified that the said bonds and coupons were on [9] deposit with said Anglo California National Bank, Chico Branch, Chico, California, to be delivered and surrendered to him upon such payment, and the said bonds and coupons remained on deposit in such manner until on or about the 21st day of May 1946, at all times available for the said Treasurer, but that during all of said time the said Treasurer failed and refused to accept delivery and surrender of said bonds and coupons, and failed and refused to pay said \$2200 and the sum of \$161.60 costs as provided in the said order of this court.

Wherefore Milo W. Bekins and Reed J. Bekins, as trustees under the Last Will and Testament of Martin Bekins, Deceased, request that an order be made permitting applicants to bring such suits and take such other proceedings in the state courts of the state of California, or in such other courts as may be appropriate, upon said bonds and coupons, and for the collection of said costs, as may seem advisable to applicants free of any restrain of this court, and for the purpose of asserting applicants' rights in and to said bonds and enforcing the payment thereof in full, and establishing and asserting any and all rights which applicants may have under the laws of the state of California.

Dated: June 13, 1946.

/s/ W. COBURN COOK,
Attorney for Applicants.

State of California,
County of San Mateo—ss.

Affidavit

Reed J. Bekins, being first duly sworn, says:

That he has read the within Application for Leave to Sue in this Matter, knows the contents thereof, and that the same is true of his own knowledge, that he caused said bonds and coupons described therein to be presented to the Treasurer of Compton-Delevan Irrigation District on or about March 25th 1946 for the purpose of delivery and surrender thereof and cancellation by the said Treasurer, upon the payment to him of \$2200 together with costs in the amount of \$161.60 as provided in the order of this court, referred to in the annexed application, and that he caused said bonds and coupons to remain on deposit with the Anglo California National Bank, Chico Branch, Chico, California, and caused advice to be given to the said Treasurer that the same were available at any time for payment as provided in said order and the said bonds and coupons remained on deposit until after May 21, 1946; that the said Treasurer failed and refused to take and accept delivery and surrender of said bonds and coupons and failed and refused to make payment of the sum of \$2200 and \$161.60 costs, or any other sum, and that on or about May 21, 1946 he caused said bonds and coupons to be withdrawn from said Anglo California National Bank; that said Reed J. Bekins is

one of said trustees of the will of Martin Bekins, Deceased and Milo W. Bekins is the other trustee, and that this affidavit is made on behalf of said trust.

REED J. BEKINS.

Subscribed and sworn before me this 21st day of June 1946.

[Seal] RICHARD VAN DER BEETS,
Notary Public in and for said
County and State of California.

[Endorsed]: Filed Oct. 7, 1946. [11]

[Title of District Court and Cause.]

NOTICE OF APPLICATION FOR ORDER
GRANTING LEAVE TO SUE

To Compton-Delevan Irrigation District, and to Jerome D. Peters, Esq., Attorney for Compton-Delevan Irrigation District:

You and each of you will please take notice that on Monday, the 21st day of October, 1946, at the hour of ten o'clock a.m. of that day, or as soon thereafter as counsel can be heard Milo W. Bekins and Reed J. Bekins, as trustees under the Last Will and Testament of Martin Bekins, Deceased, will apply to the Court for an order granting leave to sue in this matter.

A copy of said application and of the proposed Order Granting Leave to Sue in this Matter are

annexed. The evidence upon which applicants will rely consists of the pleadings and records in this cause and the annexed application.

The authorities upon which applicants rely consist of Section 403, of Title 11, U. S. C. A.

Dated: October 4, 1946.

W. COBURN COOK,

Attorney for Milo W. Bekins and Reed J. Bekins,
as trustees under the Last Will of Martin Bekins,
Deceased.

[Endorsed]: Filed Oct. 7, 1946. [12]

[Title of District Court and Cause.]

AFFIDAVIT OF JEROME D. PETERS

State of California,
County of Butte—ss.

Jerome D. Peters, being first duly sworn, deposes and says:

That he is a member of the law firm of Peters and Peters who are the attorneys of record for the Compton-Delevan Irrigation District in the above matter and who are also the attorneys for said District in that certain action pending in this Court entitled Milo W. Bekins and Reed J. Bekins, as trustees under the Last Will and Testament of Martin Bekins, deceased, Appellants, vs. Compton-Delevan Irrigation District, Appellee, being number 10934. [13]

In the course of this Affidavit, reference will be made to the "Transcript of Record" in said action number 10934, which transcript is on file in this Court in the above matter.

The action originated in connection with the final decree of Compton-Delevan Irrigation District entered and filed in this matter by this Court on August 17, 1942; the Bekins, as trustees, were the owners of certain bonds of the District, each of the face value of \$1,000.00, being numbers 409 to 415 (inc.) of Original issue bonds, and numbers R 115, R 136, R 137, R 138 and R 139 of the refunding issue, each of the face value of \$1,000.00. (Tr. 38). Under the final decree referred to, the Court ordered that the sum of \$13,640.00 which had been paid into the registry of the Court by the disbursing agent, being the balance remaining in the latter's hands of the money deposited with it to pay the composition figure on bonds surrendered, be disbursed by the registrar for the purpose of taking up and retiring and refinancing in accordance with the composition proceedings, such remaining outstanding old obligations as are affected by the plan and may be presented to the registrar for that purpose within a period of twelve months from the date of the decree; that all such obligations so presented and paid for, be forthwith cancelled and be returned to the petitioning district; that all such outstanding old obligations not presented for payment within the one year shall thereafter be forever barred from participating in the plan of composition; that upon the expiration of the period

of twelve months from the date of the decree, the clerk of the Court should forthwith notify the Reconstruction Finance Corporation of the amount of funds then remaining in the registry and that the same are available for the purchase of new bonds of the district then held by the Reconstruction Finance Corporation at par and accrued interest; that any new bonds so purchased be forthwith [14] cancelled and returned to the District; that any part of such funds not used for such purposes within sixty days after the date of mailing of such notice to the Reconstruction Finance Corporation should be paid by the registrar to the District to be used by it solely in payment of its new bonds and interest thereon. (Tr. 36).

That the Bekins trustees failed to present their eleven bonds within the one year provided in the final decree; in fact they did not present them at all, although they originally filed a verified statement of their claim on the bonds. On February 6, 1944, an inquiry was made concerning them addressed to Mr. George R. Freeman, formerly attorney for the District by Mr. W. Coburn Cook, present counsel for the trustees. On August 24, 1943, which was later than the elapsing of the year for the presentation and surrender of bonds, a report was made by the registrar of the Court, disclosing that of the original \$13,640.00 in his hands to pay bonds, there remained \$7040.00, and that in pursuance of the instructions of the assistant treasurer, that said sum of \$7040.00 was used as follows:

Payment of refunding bonds of the District numbers 81 to 86 (both inc.), each for \$1,000.00 and a bond number 74 of such issue in the sum of \$500.00 and in payment of bond number 1 in the sum of \$300.00, leaving a balance in the hands of the registrar in the sum of \$195.42, which sum was returned to the District (Tr. 53).

Following such disbursal there remained no money in the hands of the District to purchase old bonds.

That upon July 28, 1943, the Bekins trustees filed a motion in the above matter having as its purpose to set aside the provisions of the final decree and permit the presentation and surrender of the trustees bonds, and to relieve their default, and [15] to permit them to secure the composition figure of \$2200.00.

That at the time the last mentioned motion was made, the District did not have the moneys to pay these bonds; in addition, the final decree having provided the limit in which the bonds might be presented for collection of the composition figure and the time having long since expired, it contested the motion on the theory that the final decree was final, and that it could not expend the District's money, being public money, without due and legal procedure authorizing such expenditure. That the matter came up before the Federal Court for hearing and was submitted; the Court on September 19, 1944 (Tr. 64) ordered that the motion be denied.

Thereafter and upon October 14, 1944, the Bekins trustees appealed; on July 17, 1945, the United

States Circuit Court of Appeals, 9th Appellate District, reversed the order of the lower Court; thereafter the District petitioned said Court for a re-hearing which was denied upon August 22, 1945; the District then petitioned the United States Supreme Court for a Writ of Certiorari, which was denied upon December 3, 1945. Thereafter, the Writ of Mandate came down from the United States Circuit Court of Appeals; then followed the Order sought to be amended, which was made January 25, 1946.

Thereafter and on or about March 25, 1946, the Bekins bonds were sent to the Chico Branch of the Anglo California National Bank with instructions to present and deliver said bonds upon payment of the sum of \$2200.00 plus \$161.60 costs of suit. That thereafter these were presented to the Secretary-Treasurer of the District by the bank who informed the bank that he did not have sufficient funds on hand to pay same, and on or about March 28, 1946, they were returned to the Bekins. That thereafter, as affiant is informed and believes, upon March 28th, 1946, the [16] Bekins had the bonds returned to the Anglo California National Bank, Chico Branch, to remain until April 20, 1946 and if payment were not effected by that date to be returned to the Bekins. That as affiant is informed and believes, upon said date said bonds were returned to the Bekins.

That it is a matter of judicial knowledge that irrigation Districts levy assessments each year in September for moneys required for the ensuing

fiscal year. That at the time of the presentation of the bonds in question for payment at the composition figure, the District did not have sufficient funds to pay. That to secure the funds to pay, the District on March 27, 1946, sought to borrow the money from the Reconstruction Finance Corporation; on April 4, 1946, the Reconstruction Finance Corporation wrote the Secretary of the District that the District might make application to borrow the money, and if granted, the Reconstruction Finance Corporation would require the judgment be assigned to it and the District agree to make annual levies within specified years, not to exceed four, to repay the Reconstruction Finance Corporation, at which time the judgment would be released. That thereafter on May 4, 1946, the District passed a resolution to borrow the money from the Reconstruction Finance Corporation to pay the Bekins. That thereafter and by letter dated May 24, 1946, the Reconstruction Finance Corporation suggested that the District request either a new loan of it or for permission to use the District's bond reserve fund. The bond reserve fund is a fund set aside under the provisions of the agreement between the District and the Reconstruction Finance Corporation whereby the Reconstruction Finance Corporation agreed to advance the money to the District to effect its composition with its creditors, and in turn the District agreed to issue new bonds in the amount of the money so advanced, which bonds have been issued and delivered to the [17] Reconstruction Finance Corporation, and in which said

agreement it was provided that the District should build up a bond reserve fund to take care of the new bonds, principle and interest, to a sum of \$4500.00 to be built up at the rate of \$900.00 per annum until it reached the sum of \$4500.00, and thereafter to be held at such figure until the bonds were paid. That on the last mentioned date, there was \$3700.00 in said bond reserve fund, but under the agreement of the District with the Reconstruction Finance Corporation, this fund could be used for no other purpose than the one specified in the aforesaid agreement; this letter from the Reconstruction Finance Corporation was from its Kansas City office, and stated further that upon receipt of a reply from the District indicating that it would consent to the conditions outlined, that the Reconstruction Finance Corporation would transmit the matter to its Washington, D. C., headquarters for appropriate action.

That the next meeting of the Board of Directors was held June 19, 1946, at which time the entire Board stated that it was resigning, and suggested the matter be left for the determination of the new Board. That at the time the Board of Directors of the District comprised E. E. Saal, James Mills, Jr. and Hugh Baber; that upon the 8th day of July, 1946, E. E. Saal and James Mill, Jr. resigned as Directors of the District, leaving only one Director, Hugh Baber; that said Compton-Delevan Irrigation District is situation in the County of Colusa, State of California, and no land-owner resides within the District, and under law the Directors are appointed

by the Board of Supervisors; upon August 1, 1946, the Board of Supervisors appointed N. C. Post and Robert M. Smith in the place of the two who had resigned. On August 1, 1946, the Board of Supervisors appointed W. Knowles as a Director in place of Director Robert M. Smith, who had not accepted the [18] appointment. That upon October 22, 1946, the said N. C. Post and W. Knowles filed official bonds required by law and took their oath of office, and the first meeting of the Board held since the meeting of June 19, 1946, when the Board as a whole said it was resigning, was held Wednesday, November 6, 1946.

That upon July 24, 1946, the Washington, D. C., office of the Reconstruction Finance Corporation communicated with the District, suggesting that the District, through its Secretary, inform the Reconstruction Finance Corporation to the effect that the District would consent to the terms and conditions outlined in the said Reconstruction Finance Corporation's letter of May 24, 1946, which letter is referred to hereinbefore. As set forth hereinbefore, there was no Board of Directors of the District upon July 24, 1946, and hence no one from whom the Secretary could secure authority to write the Reconstruction Finance Corporation, and as stated hereinbefore there was no Board of Directors of the District until two members were appointed by the Board of Supervisors of Colusa County, and until such two members qualified upon October 22, 1946.

That to construe the order in question in conformity with the claim of the Bekins trustees would

be unequitable, and clearly was not the intention of the trial Court. That the trial Judge, Martin I. Welsh, who signed the Order in question did not intend that upon such non-payment within the thirty days that the Bekins should recover the face value of the bonds is disclosed from the fact that the Judge, of his own volition, struck from the proposed order submitted to him by the Bekins trustees the concluding seven lines, which read as follows:

“That the provisions of said decrees restraining them from pursuing their ordinary remedies upon said bonds in the State or Federal Courts shall be vacated and set aside and permission is granted to said trustees to take proceedings for the collection of said bonds in full and enforcement of [19] their rights thereon free from the restraint of the interlocutory and final decrees of this Court in these proceedings.”

From this action of the Court, affiant believes and therefore alleges that if the Court had intended that the trustees could recover the face value of the bonds in full he would not have struck out the provision giving them the right “to take proceedings for the collection of said bonds in full”.

That as affiant is informed and believes and therefore alleges, Judge Martin I. Welsh, who was the trial judge in the proceedings in the above matter is ill, and unable to be seen and talked to to ascertain his exact intentions in respect to the Order in question.

The District originally had a "first issue" of bonds in the sum of \$575,000.00; thereafter it issued the funding bonds in the aggregate principal amount of \$384,000.00; at the time of the filing of the petition for composition, the District had outstanding indebtedness under the first issue, \$103,000.00, and under the funding issue, \$281,000.00 (tr. 4).

The composition figure was twenty cents upon the dollar. All but a very few accepted the composition figure; the Bekins trustees were one of those who did not present their bonds. They brought suit to have the final decree amended so that they might present their bonds and be paid their money. This suit went through the Courts. The Bekins trustees finally prevailed, the United States Circuit Court stating that in equity the composition money to be paid for the bonds was not legally the District's, but was equitable the Bekins; this Court amended the final decree to conform therewith. To now give the Bekins the right to recover the full value of the bonds is giving them a preference which would not be in accordance with equity; all of the other bond holders that accepted the settlement figure should and ought to be entitled [20] to the full face value of the bonds, if the Bekins are. The Bekins prevailed in their suit on equitable principals, otherwise, if the decision was made on wholly legal principals they would not have prevailed. The bankruptcy court is an equitable court, this court should consider all the facts and circumstances and

should decree that they should be paid their composition money within a certain specified time. To guarantee such payment, in the event such order is made, there is sent with this petition and affidavit, a check of Compton-Delevan Irrigation District to the Registrar of the United States Federal Court in the sum of \$2200.00, together with another check to such registrar in the sum of \$161.60, the Bekins' costs, to be delivered to the Bekins upon the presentation and surrender of their bonds, or if this be not done, to be applied by the Registrar as may be ordered by the Court.

That this Court, in pursuance of principals of equity, modified the final decree to permit the Bekins to present their bonds and secure the composition money; now the Bekins are not pursuing principals of equity in demanding that they be paid at the full face value of the bonds, and the decision on this motion should be guided and decided upon the same equitable principals that were involved when the Bekins made their motion.

/s/ JEROME D. PETERS.

Subscribed and sworn to before me this 13th day of November, 1946.

[Seal]

GEO. A. ZUNDELL,

Notary Public in and for the County of Butte, State of California.

[Endorsed]: Filed Nov. 14, 1946. [21]

[Title of District Court and Cause.]

AFFIDAVIT OF JEROME D. PETERS

State of California,
County of Butte—ss.

Jerome D. Peters, being first duly sworn, deposes and says:

The affidavit filed herein by W. Coburn Cook, states that no sufficient showing has been made as to why the moneys which the Court held, were not available to creditors and belonged to the creditors, pursuant to the mandate in the case of *Bekins vs. Compton-Delevan Irrigation District*, supra, during all of said period of time for payment of petitioners' bonds and coupons and he denies that said funds were not available; in answer thereto, affiant states that the Court held no money at that time; that [22] the District did not have money with which to pay, and further states that the original affidavit of affiant filed herein discloses why, and further that all such moneys were sent long before by the Registrar of this Court to the Reconstruction Finance Corporation in Washington, D. C., in pursuance of the order of this Court.

That said W. Coburn Cook in his said affidavit further states that the correspondence between the Reconstruction Finance Corporation and the District is strictly irrelevant to any issue in this case. Affiant takes issue with this last statement of the said W. Coburn Cook and alleges that it is entirely relevant in a Court of equity to show the good faith of the District in its efforts to comply with the

direction of the Court. The said affiant, W. Coburn Cook also states in his affidavit that the District has power to borrow money, by warrant or otherwise, and that the Bekins trustees would readily have made an arrangement with the District for the payment of said bonds upon being approached on that subject, but that no offers or suggestions were ever made by the District. Affiant alleges that while irrigation districts have the power to borrow money, yet nevertheless the said Compton-Delevan Irrigation District was bound by its contract with the Reconstruction Finance Corporation to use its money for the purposes for which they were either advanced by the Reconstruction Finance Corporation or for which they were budgeted in the assessment of the District and hence to have borrowed contrary to such arrangement would have been a breach of contract by the District with the Reconstruction Finance Corporation; as to the statement that the Bekins trustees would readily have made an arrangement with the District for the payment of said bonds, affiant alleges that no offers or suggestions were made to that effect by the Bekins trustees to the District; that the District did everything in [23] its power to secure the money with which to pay the composition figure to the Bekins trustees.

Affiant W. Coburn Cook makes the following unwarranted statement: “. . . upon information and belief that there is no valid board of directors for the Compton-Delevan Irrigation District and that the counsel for the district is not authorized and

was not authorized to make the deposit with the clerk which he did in this case''; in this affiant W. Coburn Cook is entirely in error.

The original affidavit of Jerome D. Peters, states that upon July 8, 1946, E. E. Saal and James Mills resigned, leaving only one director, Hugh Baber; that on August 1, 1946, N. C. Post and Robert M. Smith were appointed as directors; that on October 1, 1946, W. Knowles was appointed as a director in place of Robert M. Smith, who had not accepted the appointment; upon October 22, 1946, the said N. C. Post and W. Knowles filed official bonds required by law and took their office. That the first meeting of the board held since June 19, 1946 was held Wednesday, November 6, 1946. In affiants original affidavit there was a slight error in the foregoing dates, but the foregoing are correct. These allegations disclosed the appointment of two members of the Board who, with the one who did not resign, Hugh Baber, constituted the Board of Directors on November 6, 1946 and since.

Affiant W. Coburn Cook states in his affidavit that it does not appear in the original affidavit of Jerome D. Peters that there is a board of directors or that there can be any board of directors except those who originally resigned, since there are no landowners in the district. There are landowners in the District, and all the lands in the district are owned. That where an irrigation district has no resident landowners, the board of directors is appointed by the board of supervisors of the county in which the district is situated, which in this case is the County [24] of Colusa, from landowners in the District.

As to the statement that the only legal board of directors is the old board which resigned, affiant states that no one of the old board resided within the district. The argument of counsel cannot be fathomed. If there be no board, then how can counsel ask the Court to place a penalty upon a district when a district has no legal ability to act? The present board however, is a duly appointed, qualified and acting board; it authorized the deposit of the \$2200.00 into the registry of this Court and the same is deposited therein.

That it was not the intention of the Honorable Judge Martin I. Welsh, who signed the order, to give to the order the meaning claimed by the Bekins trustees, as is shown and disclosed by the order and the original affidavit and this affidavit of Jerome D. Peters.

Finally, the last point of W. Coburn Cook is that the Circuit Court of Appeals held that the composition money was not legally the district's money and therefore it cannot be said that it was not available for payment. In effect the Court said this, but the money had been returned by the registry of this very Court under order of this Court to the Reconstruction Finance Corporation in Washington, D. C. and hence at the time was not available to the District, and the only manner that the District could have money readily available was to have the Reconstruction Finance Corporation advance it, which they agreed to do as disclosed by the affidavits on file herein.

That it appears from all the facts that when the Bekins trustees were in a similar position they

demand in this Court and other Courts that equity be done and received the equity which they claimed was due them. Now they take the reverse view and maintain an untenable position making no offer to do equity whatsoever. [25]

Finally Mr. Cook states that the offer of the District is inequitable, for while it offers to make payment required by the decree, it offers nothing for damages for delay, attorneys fees, costs or inconvenience. It is true no such offer has been made, but similarly when the Bekins trustees made their original motion herein, they made no such offer either. We anticipate in the matter that the Court will make an order that is equitable, for a bankruptcy Court is a court of equity, but we do not consider any such offer as suggested by the Bekins trustees to be a condition precedent to the making of the motion or application or to a decree based thereon.

Finally, affiant maintains that in equity an order should be made by this Court that the Bekins trustees surrender their bonds to the Registry of this Court and accept the \$2200.00 deposited with the Registry as the payment of the composition figure. Such an order is not only right and just, but will avoid a multiplicity of legal proceedings.

JEROME D. PETERS

Subscribed and sworn to before me this 4th day of February, 1947.

R. LAUGHLIN

Notary Public in and for the County of Butte, State

[Endorsed]: Filed February 5, 1947. [26]
of California.

[Title of District Court and Cause.]

CLOSING AFFIDAVIT OF W. COBURN COOK
ON APPLICATION FOR ORDER GRANT-
ING LEAVE TO SUE AND IN OPPOS-
ITION TO APPLICATION OF COMPTON-
DELEVAN IRRIGATION DISTRICT FOR
AN ORDER INTERPRETING THE PRE-
VIOUS ORDER GRANTING MOTION TO
MODIFY THE FINAL DECREE

State of California,
County of Stanislaus—ss.

W. Coburn Cook, being duly sworn and referring to the affidavit of Jerome D. Peters dated February 4, 1947 herein says:

1. That it does not appear from the showing of the irrigation district that they were unable to pay the \$2200.00 to Bekins Trustees previously. The Circuit Court of Appeals determined that the moneys which were sent to the R. F. C. were moneys which belonged to the Bekins Trustees and therefore the district should have obtained those moneys and paid them to the Bekins Trustees. The District and the R. F. C. converted that money illegally and wrongfully. Peters now talks about a loan from the R. F. C. That is beside the point. The money should have [27] immediately been paid to the Bekins Trustees. Peters contends that they were bound by the contract with the R. F. C. and couldn't break that contract in order to pay the Bekins Trustees. But the Court said differently.

The Court said that the contract did not change the character of that money, that that money belonged to the Bekins Trustees and should have been paid to them. Therefore the showing of the district with regard to inability to pay money completely fails. Furthermore, they do not show why, if they can get the money suddenly now they could not get it suddenly before. They have deposited money in court, but they do not show where the money came from. They could have done that before. Therefore, their showing fails.

2. Affiant relies upon Peters' own statement in his pleadings and in court relative to the question of there being no landowners in the district who could qualify as directors. We stand upon our previous statement that the present board is not a legal board. Our argument only goes to the extent of showing that if the board is not a legal board it couldn't put up the money that has been deposited. The only legal board is the board which resigned. Or perhaps we should say which attempted to resign.

3. We deny that Peters knows what the intention of the Honorable Judge Martin I. Welsh who signed the order was, and his statement as to what his intention was is a mere legal conclusion. That is a matter for this Court to determine.

We have called attention to the fact that George R. Freeman, an attorney of record for the district in this case, approved the modification of the final decree. Also that Messrs. Peters and Peters dis-

approved the form of the order [28] and in that disapproval said the district asks to have stricken the words "upon such presentation and surrender of said bonds and coupons, the trustees shall no longer be bound by the terms of the final decree or the interlocutory decree herein." That was the only language which the district wanted to have stricken out, and that is the specific language which the court did not strike out. Therefore, the matter is *res judicata*.

4. It is untrue that the Bekins Trustee in their former application were in the same position as the district is now. There was no equity for the Bekins Trustees to do. It has always been a case of the district itself failing to do equity. They have not done equity now. It is also untrue that the Bekins Trustees did not surrender their bonds. The records of this court show that the bonds were surrendered to the Clerk of the Court and by the Clerk of the Court returned to the Bekins' after payment was refused. Furthermore, affidavits on file herein show that the bonds were again tendered to the district for surrender, but obviously should not be surrendered to the district since payment was refused. See affidavit by Bekins. [29]

5. This counsel deems that the contents of Mr. Peters' Affidavit should never have been in an affidavit; that most of what he says is merely argumentative, and should have been in his points and authorities, and we apologize for submitting our

reply in affidavit form, but upon consideration determined that we had to make the answer in the same form as the document answered.

W. COBURN COOK.

Subscribed and sworn to before me this 18th day of February, 1947.

[Seal] EMMA JANE NEARING,
Notary Public in and for the County of Stanislaus,
State of California.

[Endorsed]: Filed Feb. 19, 1947. [30]

In the District Court of the United States for
the Northern District of California, Northern
Division

No. 9870

In the Matter of

COMPTON - DELEVAN IRRIGATION DIS-
TRICT (In Proceedings for Confirmation of
Plan of Composition of Outstanding Indebted-
ness)

OPINION AND ORDER

The two matters submitted are the application of the Compton-Delevan Irrigation District for an order interpreting the order of this court made January 25, 1946, and the application for leave to sue upon the bonds and coupons of Milo W. Bekins and Reed J. Bekins, as trustees under the last Will

and Testament of Martin Bekins, deceased. The previous chapters in this litigation are recounted in *Bekins v. Compton-Delevan Irrigation District* 150 Fed. 2d 526.

The facts in brief are that after publication of notices of the composition of the bonds of the District, an interlocutory, and later a final decree, fixing recovery on the bonds at 20 cents on the dollar and establishing the period of payment as one year, and after the payment of most of the bonds to the owners thereof, said trustees sought to recover on eleven bonds which were not presented within the time specified in the decrees. A motion was made by them to recover the sum of \$2,200, and the motion was denied; an appeal was taken to the Circuit Court of Appeals, which found that the trustees had received no personal notice of [31] the entry of either the interlocutory or final decree. The Circuit Court of Appeals stated that notice of the entry of the decrees should have been given to the trustees and that the \$2,200 belonged to the trustees and not to the District.

That court directed that this court grant the motion of the trustees. That motion as stated by the Circuit Court of Appeals was “to order appellee (the District) and the clerk to pay the appellants the \$2,200, ‘and if necessary for that purpose, to modify the terms of the final decree and to extend the time thereof for the deposit of said bonds, and, if necessary for that purpose, to relieve appellants from their default, and to grant them the right

to appear and claim the payment provided for by the plan of composition despite the provisions of the final decree'."

In compliance with the mandate of the Circuit Court of Appeals, this court on January 25, 1946 entered an order granting the motion to modify the final decree, which modification in effect extended the time for the trustees to deposit and surrender the eleven bonds within 30 days after the order became final and be paid the \$2,200, plus \$161.60 costs, or "upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make payment upon such presentation and surrender of said bonds and coupons, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein." It appears that the trustees presented to the District the bonds on March 25, 1946, within the time thus prescribed, but that the District failed to pay the amounts above mentioned, giving the want of the requisite funds as its reason for such failure. It appears that the money necessary to finance the composition had been borrowed by the District from the Reconstruction Finance Corporation, and the \$2,200 being a portion thereof, had, prior to the determination of the appeal, been returned by the registry of this Court to the lender under an order of this Court. On March 27, 1946, the District sought to again borrow from the Reconstruction Finance Corporation this sum of \$2,200 to pay to the trustees. Negotiations continued between the Reconstruction

Finance Corporation and the District until July 8, 1946, when two of the three members of the Board of Directors of the District resigned. Since no land owner resided in the District, under the applicable California statute the duty devolved upon the Board of Supervisors of Colusa County to appoint directors to fill these vacancies. This was done by the Board of Supervisors on August 1, 1946. Official bonds were filed by the appointees and they took office on October 22, 1946. The first meeting thereafter of the Board of Directors was held on November 6, 1946. The trustees filed herein on October 7, 1946, notice of application for an order granting them leave to sue the District for the full principal amount of the bonds upon the premise that they are no longer bound by the interlocutory and final decrees. On November 14, 1946, the District filed herein a notice of application for an order interpreting the order of modification of January 25, 1946 as meaning that, if the trustees were not paid the composition amount and costs upon presentation of their bonds within the time limited, their right of recovery against the District is limited to the collection of the composition figure and costs. On the last mentioned date the District deposited in the Registry of this court the sums of \$2,200 and \$161.60. The \$161.60 has been paid to the trustees and the \$2,200 remains so on deposit.

This proceeding was brought for composition of the debts of the District under Chapter 9 of the Bankruptcy Act, [33] as amended, 11 U.S.C.A.

Sec. 401 and following. After necessary steps had been taken the composition was ordered and the majority of the bond holders were paid the sums due them under the plan of composition.

A bankruptcy court, having no terms, sits continuously and applies the doctrines of equity. *Wayne United Gas Co. v. Owens Illinois Glass Co., et al*, 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557. *Bekins, et al v. Compton Delevan Irrigation District*, 150 Fed. 2d 526.

The bankruptcy court has jurisdiction and power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation there to * * *." 11 U.S.C.A. Section 11, sub. 7. The proper and usual place to liquidate and adjudicate claims against a debtor is in the bankruptcy court. The court may, however, in its discretion permit some other forum to be used for the adjudication of the debtor's liability; but the granting of such a privilege should be denied unless some good reason therefor exists." *Poinsette Lumber & Manufacturing Co. v. Drainage No. 7 of Poinsette County, Arkansas, et al*, 119 Fed. 2d 270.

The trustees having bonds which are entitled to the same consideration as all other bonds of the District should be entitled to their fair share of the assets of the District under the composition plan as heretofore determined. The Circuit Court of Appeals so held in applying the rules of equity for the benefit of the trustees. Under the general doc-

trine of equity and under the theory of the Bankruptcy Act the court may modify the composition plan until it is satisfied that it is fair to all creditors. *Poinsette Lumber & Manufacturing Co. v. Drainage No. 7 of Poinsette County, Arkansas*, *supra*. After the composition is confirmed and [34] substantial execution has resulted it should be given the effect of a contract. *American United Life Insurance Co. v. Haines City, Florida*, 117 Fed. 3d 574.

This being so, the trustees are bound by their implied contract with the other bondholders of the District and are entitled to be paid at the rate of 20c on the \$1.00, a total of \$2,200. To allow the trustees to sue in another forum would in effect be granting them a right superior to that accorded the other bondholders. The resources of a debtor come within the exclusive jurisdiction of the bankruptcy court upon the filing of a proper petition. *Poinsette Lumber & Manufacturing Co. v. Drainage No. 7 of Poinsette Co., Arkansas, et al*, *supra*. These facts appear: The District had to obtain the money to finance the plan of composition from the Reconstruction Finance Corporation and in good faith paid off the majority of bondholders who presented their bonds for payment within the time prescribed by the Court, and returned the balance of the money not so expended to the Reconstruction Finance Corporation, including the \$2,200 which would have been paid the trustees had the bonds been presented in time; the District was unable to comply with the modification of the decree as ordered by the Circuit Court of Appeals within the

time therein provided because of lack of funds; apparently as soon as reasonably possible the funds to pay the trustees' bonds were obtained by the District and deposited into the registry of the Court. There appears to be no good reason why this court should not under its continuing jurisdiction limit the trustees' recovery to the \$2,200 upon the surrender of their bonds. By so doing the relief ordered by the Circuit Court of Appeals will be afforded the trustees and this court will not prefer them over the other creditors. [35]

The entire proceedings should be considered in the light of equitable principles. In the light of the facts that fair plan of composition had been made with the exception of the denial of the payment of the trustees' bonds by the final decree, which inequity was disposed of by the ruling of the Circuit Court of Appeals and the later order of this court, that there is no showing by the trustees in the pending motion that there is an exceptionally good reason for their being allowed to proceed in another forum and that as the trustees are obtaining the same rate of composition for their bonds as was paid the other bondholders, the composition should be viewed as a matter contractual in nature and there is no inequity in restricting the trustees to the Bankruptcy Court for a complete adjudication of this matter.

It is contended by the trustees that Rule 60 of the Rules of Civil Procedure, 28 U.S.C.A., following Section 723c, would prevent a further action by this court since more than six months had passed

after the order of January 25, 1946, was to have been complied with. While there is no doubt that the rules apply since the issuance of General Order in Bankruptcy No. 37 by the United States Supreme Court, 11 U.S.C.A., following Section 53, the rules are not intended to abridge, enlarge or modify the substantive rights of any litigant (Section 1, Act of Congress of June 19, 1934, ch. 651, 28 U.S.C.A., Section 723b), and it is necessary to consider them as procedural with the Bankruptcy Act furnishing the substantive law. In *re Stein*, 43 Fed. Sup. 845. Here the substantive rights of the entire district would be affected if the trustees are allowed to proceed in another forum. Inasmuch as the Bankruptcy Court has jurisdiction in the making of composition plans, this court has [36] continuing jurisdiction and the rules of civil procedure do not restrict that jurisdiction.

It appears clear that the words "upon the failure of said Compton Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or the interlocutory decree herein" should not be construed to mean that if the payment was not made in accordance with the order that the jurisdiction of this court would cease. This is borne out by the fact that in the signed order the language vacating the restraint of the decree upon the trustees to pursue their ordinary remedy in the state of federal court was deleted from the proposed order presented to the court.

Of necessity the trustees would not be bound by the terms of the decree if the bonds were not paid in accordance with the order of January 25th since the Circuit Court of Appeals had found the trustees are entitled to the composition value of the bonds, namely \$2,200. It must be kept in mind that the extent of the mandate from the reviewing court was to require the granting of the motion, from the order denying which the appeal was taken. The object of that motion was not to relieve the trustees from the composition adjudication but to require the payment of the \$2,200 under an extension of time to deposit the bonds. The trustees by the modification of the order of January 25th became entitled to the same valuation placed upon the bonds by the plan of composition as the other bondholders and the order contained in the mandate of the Circuit Court of Appeals and the order of this court of January 25, 1946, grants the trustees no greater rights than the other bondholders under the plan. To hold otherwise would be to create an inequity.

Mention has been made in the briefs of attorney's fees and other expenses incurred as a result of the tardiness of the District. Reasonable attorney's fees and reasonable necessary expenses, if any, incurred herein by the trustees since the tender of the bonds should be assessed against the District. If stipulated to by counsel the evidence on this issue might be submitted upon affidavits; otherwise, the clerk will set a date for a formal hearing restricted to these matters. Upon a determination thereof an order will be entered denying the appli-

cation of the trustees for leave to sue with conditions to be named in the order.

The motion for an interpretation of the order of January 25, 1946, is granted in conformance with the interpretation expressed herein.

Dated, April 23, 1947.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed April 23, 1947. [38]

[Title of District Court and Cause.]

NOTICE

To W. Coburn Cook, Berg Building, Turlock, Calif.; Jerome D. Peters, 340 Broadway, Chico, Calif.; George R. Freeman, Willows, Calif.:

You Are Hereby Notified that on April 23, 1947, Judge Dal M. Lemmon, in accordance with an opinion and order this day signed and filed, Ordered that the application for leave to sue be and the same is hereby Denied. It is further Ordered that the application for an order interpreting the order of January 25, 1946, be and the same is hereby Granted, in accordance with the interpretation of the Court as stated in his written opinion.

C. W. CALBREATH,

Clerk,

U. S. District Court.

Sacramento, California

April 24, 1947. [39]

[Title of District Court and Cause.]

STIPULATION

It is stipulated by and between Compton Delevan Irrigation District, and Milo W. Bekins and Reed J. Bekins, as trustees under the last Will and Testament of Martin Bekins, Deceased, that the matter of payment of reasonable attorneys' fees and reasonable necessary expenses incurred by the trustees herein, as referred to in the Opinion and Order filed April 23, 1947, herein, may be submitted to the Court by Affidavit.

Dated, May 2, 1947.

PETERS AND PETERS,
JEROME D. PETERS,
Attorney for Compton
Delevan Irrigation District.

W. COBURN COOK,
Attorney for Milo K. Bekins
and Reed J. Bekins, as
trustees under the last Will
and Testament of Martin
Bekins, Deceased.

[Endorsed]: Filed May 26, 1947. [40]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Butte—ss.

Jerome D. Peters, being first duly sworn, deposes and says:

That the firm of Peters and Peters, is attorney for Compton Delevan Irrigation District in the above matter; that he has read the affidavit of W. Coburn Cook, attorney for the Bekins trustees, filed herein in pursuance of the suggestion of the Court in reference to attorneys fees and costs upon the application of the Bekins trustees to sue and upon the application of the District for an interpretation and order of the Court.

The writer believes that the Court is fully able to determine what is equitable that the Bekins trustees be paid for counsel fees and costs. [41]

The matters concerning which counsel fees and costs are asked, originated in a motion by the Bekins trustees to sue for the entire face value of the bonds, which the writer assumes would also include interest. If the motion had been made for an order for leave to sue for the compromise figure, no further legal action would have been required, and it would have been stipulated that they might do so. However, the motion to sue for the face value of the bonds had to be resisted; which led to the motion of the district to interpret the decree of the Court which was eventually interpreted in

its order of April 23, 1947, by this Court. By reason of the application for leave to sue for the face value of the bonds, there was made necessary the briefs in connection with the respective parties, all of which would have been avoided if, as pointed out above, the original application had been for leave to sue for the composition figure.

The writer does not care to pass upon the reasonableness or unreasonableness of another attorney's fees; the writer submits the matter to this Court knowing that this Court will consider the situation and the matters involved and render a decision which it deems just and proper in respect to both parties.

JEROME D. PETERS.

Subscribed and sworn to before me this 28th day of May, 1947.

[Seal]

R. LAUGHLIN,

Notary Public in and for the County of Butte, State of California.

[Endorsed]: Filed May 31, 1947. [42]

[Title of District Court and Cause.]

FINDINGS AND ORDER

Milo W. Bekins and Reed J. Bekins, as trustees, having heretofore filed their motion herein for leave to sue, and Compton-Delevan Irrigation District having also filed a motion herein for the interpretation of the Court's Order modifying final decree, which Order was made and entered January 25, 1946, and the Court having passed upon said motions by its preliminary order made and entered April 24, 1947, wherein was denied the petition to sue and was granted the motion to interpret the final decree, the Court in its opinion interpreting the final decree in conformity with the interpretation requested by Compton-Delevan Irrigation District, but however, being of the opinion that the District should pay to the Bekins trustees, counsel fees and costs in the matter, in a reasonable sum and suggesting that the respective parties arrange and agree upon such sum or submit it to the Court upon affidavits, and the matter being submitted to the Court upon affidavits, and the Court having fully considered said affidavits and the entire subject matter,

It is the finding of the Court from the affidavits filed by counsel that the District failed to accept and pay the composition value of the bonds presented to it by Milo W. Bekins and Reed J. Bekins, trustees as heretofore provided for [43] by order heretofore entered herein on January 25, 1946;

that following and as a result of such failure, said trustees filed herein said motion for leave to sue and said District filed its motion for interpretation of said order of January 25, 1946; that said trustees incurred costs and attorney fees in presenting their said motion to this court and in resisting the motion of said District; that had the said District not failed to pay said composition value of said bonds within the period so provided in said order of January 25, 1946, said trustees would not have incurred said additional costs and attorney fees; that the reasonable amount of said attorney fees so incurred is the sum of \$350.00 and that the additional costs so incurred by said trustees amount to \$35.00; that said District should, in addition to the payment of the composition value of said bonds, be required to pay to said trustees said additional costs and attorneys fees.

Therefore, It Is Hereby Ordered that Compton-Delevan Irrigation District pay into the registry of this Court the sum of \$385.00 as and for a reasonable counsel fee and costs which the Court awards to the Bekins Trustees in this matter, and upon said sum being paid, this Court will make its final order denying the trustees leave to sue.

Dated, June 19th, 1947.

DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed June 19, 1947. [44]

[Title of District Court and Cause.]

NOTICE

To W. Coburn Cook, Turlock, Calif.; Peters & Peters, 304 Broadway, Chico; George R. Freeman, Willows, Calif.:

You Are Hereby Notified that on June 19, 1947, Judge Dal M. Lemmon Ordered that in accordance with findings and order this day signed and filed, the petition for attorneys fees be and the same is hereby Granted. It is further Ordered that the Compton-Delevan Irrigation District pay into the registry of this court the sum of \$385, as and for a reasonable counsel fee and costs, and upon said sum being paid, this Court will make its final order denying the trustees leave to sue.

C. W. CALBREATH,
Clerk, U. S. District Court.

Sacramento, California

June 20, 1947. [45]

[Title of District Court and Cause.]

ORDER

Milo W. Bekins and Reed J. Bekins, as trustees, having heretofore filed their motion herein for leave to sue, which was opposed by Compton-Delevan Irrigation District, and the latter District having also filed a motion herein for the interpretation of the Court's Order modifying final decree, which order was made and entered January 25, 1946, and the Court having passed upon said motions by its preliminary decision made and entered April 24, 1947, wherein the Court denied the petition of the Bekins trustees to sue and granted the motion of Compton-Delevan Irrigation District to interpret the final decree, subject to the decision of the Court, in which decision the Court stated it was of the opinion that the District should pay to the Bekins Trustees counsel fees and costs in the matter in a reasonable sum, and suggesting that the respective parties arrange and agree upon such sum or submit it to the Court upon affidavits, and the matter [46] being submitted to the Court upon affidavits, the Court, after duly considering the matter, upon the 19th day of June, 1947, entered its Order that the Compton-Delevan Irrigation District pay into the registry of the Court the sum of \$385.00, as and for a reasonable counsel fee and costs and furthermore upon such sum being paid, the Court would make its further order denying the Bekins leave to sue, and the District having paid into the registry

of said Court the said sum of \$385.00 as attorneys fees and costs of the Bekins Trustees, and having fully conformed with the said Order of the Court;

It Is Hereby Finally Ordered that the petition or application of the Bekins Trustees to sue be and the same is hereby denied, and

It Is Further Ordered that the registrar of this Court pay to the said Bekins as Trustees, the said sum of \$385.00, as and for reasonable attorneys fees and costs in these proceedings, upon their application therefor.

Dated:

DAL M. LEMMON,

Judge of the Federal Court.

[Endorsed]: Filed July 16, 1947. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT (UNDER RULE 73)

Notice Is Hereby Given that Milo W. Bekins and Reed J. Bekins as Trustees under the Last Will and Testament of Martin Bekins, Deceased, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Preliminary Opinion and Order made and filed herein on April 23, 1947, and from the Final Order thereon denying the petition of the said Bekins Trustees to sue and interpreting the

court's previous order which modified the final decree dated January 25, 1946, entered in this proceeding on July 16, 1947. This appeal is from the whole of the preliminary Opinion and Order filed April 23, 1947, made effective by the order filed July 16, 1947, and from the whole of the said order filed July 16th, 1947.

Dated, August 20, 1947.

W. COBURN COOK,
Attorney for Appellants.

[Endorsed]: Filed Aug. 21, 1947. [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS AND ASSIGNMENT OF ERRORS ON APPEAL

The Appellants, Milo W. Bekins and Reed J. Bekins as Trustees under the Last Will and Testament of Martin Bekins, Deceased, make the following assignment of errors which they aver occurred in the determination of this proceeding and in the rendering of the decrees appealed from, and state that the points on which they intend to rely on the appeal of this cause are the following:

1. The court erred in denying the application of the Bekins Trustees for leave to sue upon the bonds held by the Trustees.

2. The court erred in granting the application

of the Compton-Delevan Irrigation District for an order interpreting the order of the court made January 25, 1946.

3. The court erred in holding that it had continuing jurisdiction in the matter of the bankruptcy plan.

4. The court erred in holding that the Rules of Civil Procedure for Federal Courts do not restrict the continuing [49] jurisdiction of the court.

5. The District Court did not have power to change or modify the order of January 25, 1946, made pursuant to the Mandate of the Circuit Court of Appeals in the prior appeal after the expiration of the time provided in the Rules of Civil Procedure.

6. The court was without power to interpret the order of January 25, 1946, after the expiration of the time provided in Rule 60 of the Rules of Civil Procedure in such a manner as to nullify the effect of the order.

7. The evidence was insufficient to sustain the finding of the District Court that the Compton-Delevan Irrigation District could not have paid the amount due the Trustees prior to the time when the moneys were deposited with the registry of the court.

8. The court erred in determining and holding in effect that until moneys were borrowed from the Reconstruction Finance Corporation the Compton-Delevan Irrigation District could not otherwise furnish the moneys due the trustees.

9. The court erred in determining in effect that equitable reasons were evidenced and shown as a foundation for the court's order.

10. The court was in error in determining and holding that it had exclusive or any jurisdiction of the resources of the debtor.

11. The court erred in not applying the provisions of the Municipal Bankruptcy Act which provide that upon the failure of the debtor to furnish the consideration for the composition the creditor is no longer bound by the plan.

12. The court erred in determining and holding that there were no officers of the district who could act to provide the moneys due the trustees prior to the hearing in this matter below.

Dated: Sept. 4, 1946.

W. COBURN COOK,

Attorney for Appellants.

[Endorsed]: Filed Sept. 6, 1947. [50]

[Title of District Court and Cause.]

REGISTRY DOCKET PAGE

DEPOSITARY

		Received	Disbursed	Balance
11/14/46	Received from Compton- Delevan Irr. Dist.....		\$2200.00	
	Received from Peters & Peters	161.60		
1/6/47	To Milo W. Bekins, etc., Check 2208		\$161.60	
6/25/47	Deposit for fees & costs..	385.00		
7/16/47	To Milo W. Bekins, etc., Check 2309		\$385.00	\$2200.00

[Title of District Court and Cause.]

ORDER FOR EXTENSION OF TIME

Good Cause Appearing Therefor, it is ordered that the time for docketing the appeal herein be extended to and including October 10, 1947.

Dated, September 19th, 1947.

DAL M. LEMMON,

Judge, U. S. District Court.

[Endorsed]: Filed Sept. 19, 1947. [56]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 56 pages, numbered 1 to 56, inclusive, contain a full, true and correct transcript of certain records, and proceedings in the matter of the Compton-Delevan Irrigation District, No. 9870, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation and Counter-designation of Portions of the Record to be contained in the Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Seven and 90/100 (\$7.90), and that the same has been paid to me by the attorney for the appellants herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 23rd day of September, A. D. 1947.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ F. M. LAMPERT,
Deputy Clerk. [57]

[Endorsed]: No. 11737. United States Circuit Court of Appeals for the Ninth Circuit. Milo W. Bekins and Reed J. Bekins, as Trustees under the Last Will and Testament of Martin Bekins, deceased, Appellants, vs. Compton-Delevan Irrigation District, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed September 24, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11737

MILO W. BEKINS and REED J. BEKINS, as
Trustees under the Last Will and Testament
of Martin Bekins, deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION
DISTRICT,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL

The appellants adopt as the points on appeal on
which they intend to rely, the Statement of Points
designated and filed in the United States District
Court.

Dated, October 1, 1947.

/s/ W. COBURN COOK,
Attorney for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 2, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL AND FOR PRINTING

The appellant designates as those parts of the record as necessary for the consideration of the points upon which the appellant intends to rely in this appeal and for printing herein the following:

1. The entire transcript of record on appeal herein except the transcript of record on appeal in the case of *Bekins v. Compton-Delevan Irrigation District*, No. 10,934 in the United States Circuit Court of Appeal for the Ninth Circuit, and excepting also designation of contents of record on appeal and counter designation of contents of record on appeal in the United States District Court.

2. Statement of Points and Designation of Record for Printing in the United States Circuit Court of Appeal.

Dated, October 1, 1947.

/s/ W. COBURN COOK,
Attorney for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 2, 1947.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is stipulated between appellants and appellee that the motion of appellants for an order providing that that part of the record on appeal herein which is contained in the printed transcript of record on appeal in the former case of Bekins v. Compton-Delevan Irrigation District, numbered 10934 in this court need not be reprinted, be granted. Receipt of a copy of said former record is also admitted.

Dated, September 26, 1947.

/s/ W. COBURN COOK,
Attorney for Appellants.

PETERS AND PETERS,
Attorneys for Appellee.

[Endorsed]: Filed Oct. 3, 1947.

[Title of Circuit Court of Appeals and Cause.]

MOTION

Appellants move the court for an order providing that that part of the Transcript of Record on Appeal herein which consists of the printed Transcript of Record on Appeal in the previous case entitled *Bekins v. Compton-Delevan Irrigation District*, No. 10,934 in this court need not be reprinted but that in lieu of printing three copies of the same be made available to the court out of its files or from other sources.

Dated, October 1, 1947.

/s/ W. COBURN COOK,
Attorney for Appellants.

It is so ordered.

/s/ WILLIAM DENMAN,
Judge, U. S. Circuit Court.

Dated, October 2, 1947.

[Endorsement]: Filed Oct. 3, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF THE RECORDS, PROCEEDINGS AND EVIDENCE
APPELLEE DESIRES PRINTED

Appellee Compton-Delevan Irrigation District designate the following additional portions of the records, proceedings, and evidence to be included in the record on appeal as follows, to wit:

1. Notice of application for order granting leave to sue made by appellants, dated October 4, 1946.
2. Proposed order granting leave to sue in this matter.
3. Affidavit of Jerome D. Peters dated November 13, 1946, and filed on or about said date.
4. Affidavit of Jerome D. Peters filed on or about February 4, 1947.
5. Opinion and order of the United States District Court dated April 23, 1947.
6. Notice to counsel by clerk of the United States District Court dated April 24, 1947.
7. Stipulation between counsel dated May 2, 1947.
8. Docket entry showing deposit on or about November 13, 1946, of \$2200.00 and \$161.00, with the registrar of the United States District Court; the former to pay the composition figure on the bonds and the latter to pay the costs on appeal in

the action of Milo W. Bekins, etc. vs. Compton-Delevan Irrigation District; docket entry showing the withdrawal by the appellants of the \$161.00.

9. Letter from Dal M. Lemmon, United States District Judge, to counsel, dated June 3, 1947.

10. Findings and order of the court dated either June 19 or June 20, 1947.

11. Notice to counsel from the clerk of the United States District Court dated June 20, 1947.

12. Final order of the court in the matter dated July 16, 1947.

13. Docket entry showing deposit with the registrar of the court by appellee of \$385.00, \$350.00 of which was attorney's fees for appellants counsel, and \$35.00 representing court costs.

14. Any docket entry showing the withdrawal by appellants or their attorney of any of the moneys deposited as aforesaid with the registrar of the court.

Dated, October 6, 1947.

PETERS AND PETERS,
Attorney for the Appellee.

[Endorsed]: Filed Oct. 8, 1947.

In the District Court of the United States for the
Northern District of California, Northern
Division

No. 9870

In the Matter of

COMPTON-DELEVAN IRRIGATION DIS-
TRICT (in Proceedings for Confirmation of
Plan of Composition of Outstanding Indebted-
ness).

AFFIDAVIT OF W. COBURN COOK IN
OPPOSITION TO APPLICATION FOR
ORDER AMENDING ORDER OF JAN. 25,
1946

State of California,
County of Stanislaus—ss.

W. Coburn Cook, being duly sworn in opposition to the application of the Compton-Delevan Irrigation District for an order amending the order of January 25, 1946, herein says:

That Jerome D. Peters is obviously in error in referring to an action pending in this Court entitled Milo W. Bekins, et al. v. Compton Delevan Irrigation District, No. 10934. The number of this proceeding is 9870, and the number 10934 is a number which was assigned to the appeal of Milo W. Bekins and Reed J. Bekins as Trustees in the United States Circuit Court of Appeals for the Ninth Circuit when they appealed from the order of Judge Welsh denying the application for payment of the Trustees' bonds.

Reference is made to the application for leave to sue in this matter and the accompanying statement and affidavit, and the same is incorporated herein by this reference.

Affiant further says that the bonds and coupons referred to herein were on or about March 25, 1946, presented to the Treasurer of Compton Delevan Irrigation District for delivery and surrender pursuant to the order of this court amending the final decree dated January 25, 1946 (notice of entry of the order given February 4, 1946) and that said bonds and coupons remained on deposit with the Anglo California National Bank, Chico Branch, Chico, California, and were available for surrender and delivery as provided in said order until after May 21, 1946, and that said treasurer failed and refused to take and accept delivery and surrender of said bonds and coupons and failed and refused to make payment of the sum of \$2200.00 or the sum of \$161.60 costs provided in said order or any other sum and that said bonds and coupons were not withdrawn until on or about May 21, 1946, and then only because of such failure and refusal to pay.

That the time within which said bonds could be paid pursuant to said order expired on the fourth day of April, 1946.

That no sufficient showing has been made as to why the moneys which the court held were available to creditors and belonged to the creditors pursuant to the mandate in the case of *Bekins v. Compton Delevan Irrigation District*, *supra*, were not available for payment during all of said period of time

for payment of petitioners' bonds and coupons and affiant denies that the said funds were not available.

That the correspondence between the Reconstruction Finance Corporation and the district is strictly irrelevant to any issue in this case.

That the district has the power of borrowing money by warrant or otherwise and that the Bekins Trustees would readily have made an arrangement with the district for payment of said bonds upon being approached on that subject but no offers or suggestions were ever made by the district.

That at the appearance of Jerome D. Peters upon the application for order for leave to sue in this case, Mr. Peters stated to this court that the board of directors of said district had resigned and that there was no board of directors and affiant alleges upon information and belief that there is no valid board of directors and that counsel in this case is not authorized and was not authorized to make the deposit with the clerk which he made in this case, and that the district is without authority except by virtue of an act of its board of directors to make such deposit and calls attention to the fact that no evidence of such authorizing resolution is on file herein; that it does not appear from the affidavit of Jerome D. Peters that there is a board of directors or that there can be any board of directors except those who originally resigned since there are no landowners in the district. Water Code, Section 21100.

That it is not true that the Honorable Judge Martin I. Welsh who signed the order in question did so inadvertently or without intending the mean-

ing ordinarily deductible from the words used. He intended that the Bekins Trustees should be relieved from the effect of the interlocutory and final decree, upon default in payment by the district.

As pointed out in Mr. Peters' affidavit the Circuit Court of Appeals held that the composition money was not legally the district's money and therefore it cannot be said that it was not available for payment.

In no case is the offer of the district equitable. While it does offer to make the payment required by the decree, it offers nothing for damages for delay, attorneys fees, costs or inconvenience.

W. COBURN COOK.

Subscribed and sworn to before me this 3rd day of January, 1947.

[Seal] EMMA JANE NEARING,
Notary Public in and for the County of Stanislaus,
State of California.

Receipt of copy is acknowledged this 6th day of January, 1947.

PETERS & PETERS.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: C. W. CALBREATH,
Clerk, District Court of the U. S., Northern District
of California.

By /s/ F. M. LAMPERT,

[Seal] Deputy Clerk.

[Endorsed]: Filed Jan. 6, 1947.

Title: Compton-Delevan Irrigation District

Docket 9870 Bk

REGISTRY DOCKET PAGE—CORRECTED

Depository		Received	Dis- bursed
11/14/46	Received from Compton-Delevan Irr. Dist.	\$2,200.00	
	Received from Peters & Peters....	161.60	
1/ 6/47	To Milo W. Bekins, etc.2208		\$161.60
6/25/47	Deposit for fees & costs	385.00	
7/16/47	To Milo W. Bekins2309		385.00
9/30/47	Returned by Bekins.....	385.00	

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. CALBREATH,

[Seal]

Clerk, District Court of the U. S.
Northern District of California.By /s/ F. M. LAMPERT,
Deputy Clerk.

In the United States Circuit Court of Appeal
for the Ninth Circuit

No. 11737

MILO W. BEKINS and REED J. BEKINS,
Trustees under the Last Will and Testament
of Martin Bekins, deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION
DISTRICT,

Appellee.

STIPULATION

It is stipulated between appellants and appellee that the affidavit of W. Coburn Cook dated January 3, 1947, which was omitted from the record on appeal herein and also record of the Clerk of redeposit of \$385.00 paid by the Clerk to the appellants be added to the record on appeal herein.

Dated November 10, 1947.

/s/ W. COBURN COOK,
Attorney for Appellants.

PETERS & PETERS,
Attorneys for Appellee.

ORDER

It Is Ordered that the material above referred to be added to the record on appeal herein.

Dated November 28, 1947.

/s/ FRANCIS A. GARRECHT,
Judge, U. S. Circuit Court.

[Endorsed]: Filed Nov. 28, 1947.

No.11737

United States
Circuit Court of Appeals
For the Ninth Circuit.

MILO W. BEKINS and REED J. BEKINS, as
Trustees under the Last Will and Testament of
Martin Bekins, deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION
DISTRICT,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

MAR - 4 1948

PAUL P. O'BRIEN,
Clerk

No.11737

United States
Circuit Court of Appeals

For the Ninth Circuit.

MILO W. BEKINS and REED J. BEKINS, as
Trustees under the Last Will and Testament of
Martin Bekins, deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION
DISTRICT,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States Circuit Court of Appeals
for the Ninth Circuit

No. 11737

MILO W. BEKINS and REED J. BEKINS,
as Trustees under the last will and testament of
Martin Bekins, deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION
DISTRICT,

Appellee.

STIPULATION

It Is Hereby Stipulated between appellants and appellee that certain two documents which were omitted from record on appeal herein, be added to the record on appeal herein, they being the following, to-wit:

I.

“Notice of Application” of Compton-Delevan Irrigation District, to have interpreted the order of the District Court granting motion to modify final decree and amending said order to conform to the interpretation intended to be placed thereon by the Court, together with the “Authorities on Motion,” to which is attached the “Affidavit of Jerome D. Peters,” which affidavit, however, is included in the record (R. 15-25).

II.

Proposed "Order Granting Motion to Modify Final Decree" dated January, 1946, which order was not signed by the District Court, and from which the concluding sentence was deleted.

It was further stipulated that these papers may be forwarded to United States Circuit Court of Appeals, Ninth Appellant Circuit, as a "Supplemental Transcript of Record."

Dated January 23, 1948.

/s/ W. COBURN COOK,
Attorney for Appellants.
PETERS & PETERS,
Attorneys for Appellees.

So ordered:

/s/ FRANCIS A. GARRECHT,
Senior United States
Circuit Judge.

[Endorsed]: Filed Jan. 26, 1948.

PETERS & PETERS,

304 Broadway,
Chico, California,

Attorneys for Compton-Delevan
Irrigation District.

In the District Court of the United States for the
Northern District of California, Northern
Division

No. 9870

In the Matter of

COMPTON-DELEVAN IRRIGATION DIS-
TRICT (In Proceedings for Confirmation of
Plan of Composition of Outstanding Indebt-
edness)

NOTICE OF APPLICATION

To Milo W. Bekins and Reed J. Bekins, as trustees
under the Last Will and Testament of **Martin**
Bekins, deceased, and to W. Coburn Cook, Esq.,
attorney for said trustees:

You and each of you will please take notice that
on Monday, the 25th day of November, 1946, at the
hour of 2:00 o'clock p.m. of that day, or as soon
thereafter as counsel may be heard, Compton-
Delevan Irrigation District will apply to the Court
for an order interpreting the order of the above-
entitled court granting motion to modify final de-

cree, and amending said order to conform to the interpretation intended to be placed thereon by the Court, and in the interpreting thereof and in amending the order to conform with the interpretation, that the second paragraph thereof be amended and changed to read as follows, to-wit:

Now, Therefore, upon application of said movents It Is Ordered, Adjudged and Decreed that the final decree entered herein August 17, 1942, be and the same is hereby modified to extend the time for deposit and surrender of said bonds as herein provided and that the said trustees may, within thirty (30) days after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, the petitioner herein, bonds numbers 409, 410, 411, 413, 414 and 415 of the original issue of bonds of said district, and bonds numbers R115, R136, R137, R138, and R139 of the Refunding issue of said District, each of the par value of \$1000, together with appurtenant unpaid coupons maturing January 2, 1932, and subsequent, and upon such presentation and the surrender of said bonds and coupons with deductions for missing coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of \$2200.00 upon said bonds and coupons with deductions for missing coupons, if any be missing, as provided in the said final decree and in the interlocutory decree heretofore entered herein, and shall also pay to said trustees the sum of \$161.60 costs taxed herein, or upon the failure of said

Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein, excepting that they shall be bound by the composition figure determined by said decrees to be the maximum figure the District is able to pay, to-wit, twenty cents on each one dollar.

Also in such an order to provide that upon the payment of the composition figure of \$2200.00 plus the sum of \$161.60 costs, within five days into the registry of this Court, and notification to said trustees of such fact, that the said trustees shall have sixty days in which to present and surrender their said bonds and accept the said settlement money of \$2200.00; that, however, they shall recover their costs of \$161.60 irrespective of whether they present their bonds or not.

The grounds of said motion are that the trustees interpret the order to mean that if upon presentation of their bonds to the District to be surrendered upon payment of the composition figure, and costs, if the same were not paid within thirty days, that they should then be relieved from the provisions of the interlocutory and final decree completely and contend that having presented their bonds and not being paid within thirty days from such presentation that they are so relieved; they are now asking

in these proceedings through motion filed, for the right to sue upon the bonds for their full face value.

Movents contend that such a result was not in the contemplation of or intended by the Court and that the intention of the Court was that if the said trustees were not paid within said thirty days, that then they should have rights given them by law to collect the composition figure and costs.

This application will be based upon this written notice, upon all the records and files in the action of Milo W. Bekins and Reed J. Bekins, as trustees under the last will and testament of Martin Bekins, deceased, Appellants, vs. Compton-Delevan Irrigation District, Appellee, pending in this Court and being number 10934, on all of the papers and records on file in the above matter and upon the affidavit of Jerome D. Peters, Jr., attached hereto and served herewith.

Dated November 8, 1946.

PETERS & PETERS,

Attorneys for Compton-

Delevan Irrigation District.

Authorities on Motion

Chapter IX Bankruptcy Act of the United States;

Title 28, Section 118, U. S. C.;

Rules 4, 55 and 60, Federal Rule Civil Procedure;

Wright v. Board of Public Institutions, 142 Fed. (2d) 577.

Whereas time limits are prescribed by various sections of the bankruptcy act for setting aside or modifying an arrangement or other settlement, or order, e.g., Bankruptcy Act, Section 386, it would appear that there is no specific time limit within which a decree must be modified under Chapter IX.

See also

Thumness v. Vonhoffman, 109 Fed. (2d) 291;

In re Parent, 30 Fed. Supp. 943;

Rerat v. Fisk Tire, 28 Fed. (2d) 607;

In re Brecher, 4 Fed. (2d) 1001;

Lerner v. First Wisconsin National Bank,
294 U. S. 116, 55 S. C. 360.

[Endorsed]: Filed Nov. 14, 1946.

[Title of District Court and Cause.]

NOTICE OF LODGEMENT

To Compton-Delevan Irrigation District and
Jerome D. Peters and George R. Freeman,
Attorneys:

You and each of you will please take notice that on or about January 19, 1946, there was lodged with the Clerk of the Above Entitled Court at the Court-house in Sacramento, California, a proposed order granting motion to modify final decree (copy of which is annexed), in duplicate and that you are required under Rule 5(d) to approve or disapprove the same as to form as provided in said Rule.

W. COBURN COOK,
Attorney for Milo W. Bekins and Reed J. Bekins,
as trustees appointed by the will of Martin
Bekins, Deceased.

[Endorsed]: Filed Jan. 26, 1946.

[Title of District Court and Cause.]

PROPOSED ORDER GRANTING MOTION TO MODIFY FINAL DECREE

In this matter the Mandate of the United States Circuit Court of Appeals for the Ninth Circuit having come down directing this court to grant the motion of Milo W. Bekins and Reed J. Bekins, as trustees appointed by the will of Martin Bekins,

Deceased, for an order requiring the Compton-Delevan Irrigation District to pay said trustees \$2200.00 upon surrender and deposit of \$11,000 principal amount of bonds of said district, with appurtenant coupons, and to modify the terms of the final decree entered herein to extend the time for depositing said bonds and to relieve the said parties from their default, if any herein,

Now, Therefore, upon application of said movents It Is Ordered, Adjudged and Decreed that the final decree entered herein August 17, 1942, be and the same is hereby modified to extend the time for deposit and surrender of said bonds as herein provided and that the said trustees may, within thirty (30) days after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, the petitioner herein, bonds numbers 409, 410, 411, 413, 414 and 415 of the original issue of bonds of said district, and bonds numbers R115, R136, R137, R138, and R139 of the Refunding issue of said District, each of the par value of \$1000, together with appurtenant unpaid coupons maturing January 2, 1932, and subsequent, and upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of \$2200.00 upon said bonds and coupons with deductions for missing coupons, if any be missing, as provided in the said final decree and in the interlocutory decree heretofore entered herein, and shall also pay to said trustees the sum of \$161.60 costs

taxed herein, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein, and the provisions of said decrees restraining them from pursuing their ordinary remedies upon said bonds in the State or Federal Courts shall be vacated and set aside and permission is granted to said trustees to take proceedings for the collection of said bonds in full and enforcement of their rights thereon free from the restraint of the interlocutory and final decrees of this court in these proceedings.

Dated January, 1946.

Judge,
U. S. District Court.

Approved as to Form as provided in Rule 5(d)
January 21st, 1946.

~~—GEORGE R. FREEMAN,—~~
Attorney for Petitioner.

Disapproved as to Form as provided in Rule 5(d)
for the reason

January 21, 1946.

GEORGE R. FREEMAN,
Attorney for Petitioner.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO SUPPLEMENTAL TRAN-
SCRIPT OF RECORD

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 8, inclusive, contain a full, true and correct transcript of certain records in the matter of the Compton-Delevan Irrigation District, No. 9870, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with a Stipulation filed in the United States Court of Appeals for the Ninth Circuit in case number 11737.

I further certify that the cost of preparing and certifying the foregoing Supplemental Transcript is the sum of Two and 80/100 (\$2.80), and that the same has been paid to me by the attorney for the appellants herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 18th day of February, A.D. 1948.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ F. M. LAMPERT,
Deputy Clerk.

[Endorsed]: No. 11737. United States Circuit Court of Appeals for the Ninth Circuit. Milo W. Bekins and Reed J. Bekins, as Trustees under the Last Will and Testament of Martin Bekins, deceased, Appellants, vs. Compton-Delevan Irrigation District, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed February 19, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11,737

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

MILO W. BEKINS and REED J. BEKINS
as Trustees under the Last Will of
Martin Bekins, Deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION DIS-
TRICT,

Appellee.

BRIEF FOR APPELLANTS.

W. COBURN COOK,
Berg Building, Turlock, California,
Attorney for Appellants.

FILE

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PAUL P. O'BRIEN

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No. 11,737

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILO W. BEKINS and REED J. BEKINS
as Trustees under the Last Will of
Martin Bekins, Deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION DIS-
TRICT,

Appellee.

BRIEF FOR APPELLANTS.

JURISDICTIONAL FACTS AND PLEADINGS.

This cause arose out of a proceeding for composition of debt of the Compton-Delevan Irrigation District, an irrigation district organized under the provisions of "the California Irrigation District Act" of the State of California, approved March 31, 1897, being Stats. 1897, page 254, and acts amendatory thereof. The proceeding was authorized under the provisions of Chapter IX of the bankruptcy Act of 1898 (11 U.S.C.A., Sec. 401-404).

The jurisdiction of this court in this appeal is under Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938.

The petitioner herein (appellee district) filed its petition for confirmation of composition December 13, 1941 (R. 2-16, case No. 10934).¹

After a hearing upon the plan of composition an interlocutory decree was entered in the District Court (R. 23-31, case No. 10934) on February 24, 1942, and a final decree was entered August 17, 1942 (R. 32-38, case No. 10934).

The present appellants failed to present their bonds for payment within the time limited in the decree and applied to the District Court for an order authorizing payment. This application was denied in the District Court and an appeal taken from the order and this court reversed the order below and issued its Mandate to the District Court (R.2), whereupon the motion to modify the final decree was granted (R.5). The conditions in the order not having been complied with by the appellee, the appellants in this cause applied below for leave to sue upon their original obligation, freed of the composition proceedings. (R.10). The district in reply asked the court below to modify the final decree. This appeal is from the final order of the court below dated July 16, 1947 (R. 50, 51) denying the application of the Bekins

¹This appeal is numbered in this court 11,737. A part of the record on appeal is the printed transcript of record on appeal in the former case of *Bekins v. Compton-Delevan Irrigation District*, No. 10,934 in this court (R. 58). An order was obtained from this court providing that the record in the former case No. 10,934 need not be reprinted (R. 60). As it is necessary to refer to the record on appeal in the former appeal No. 10,934, we will when referring to that part of the record add the phrase "case No. 10,934". Otherwise the reference to the record will be in the present appeal, No. 11,737.

Trustees for leave to sue and granting a modification of the final decree. This order was filed July 16, 1947 (R. 51). Notice of appeal was filed August 21, 1947 (R. 52), there being no notice of the entry of the order given.

STATEMENT OF THE CASE.

Throughout this brief the Compton-Delevan Irrigation District will be referred to as the district and appellants will be referred to as the trustees.

The proceeding is under the Municipal Bankruptcy Act of the United States, Title 11 U.S.C.A., Sections 401-404.

~~At the outset it should be noted that a former appeal was taken in this cause as stated above, the number in this court being 10934 and by order of this court the transcript of record in the former case is not reprinted but is a part of the record on appeal here (R. 60). References to the record in the former case will be distinguished by using the number of that case following the reference to the record (R. 10934) otherwise the references are to the printed record on appeal in the instant appeal No. 11737.~~

The Compton-Delevan Irrigation District is an irrigation district organized under the laws of the State of California and a public agency. The plan of composition is set forth in the petition for composition (R. 2, case No. 10934). The district had a debt of \$384,000 and had borrowed from the Reconstruction

Finance Corporation of the United States the sum of \$76,000 (R. 7, case No. 10934), and proposed to pay each of its creditors the sum of \$200 per thousand dollar bond without any of the many years' interest. The plan of composition went through without opposition and an interlocutory decree was entered on March 11, 1942 confirming the plan of composition (R. 31, case No. 10934). Shortly thereafter the final decree was entered on August 17, 1942 (R. 38, case No. 10934).

The appellants, the trustees, were the owners of \$11,000 par value of bonds of the district and filed their claim in the proceedings January 26, 1942 (R. 23, case No. 10934).

The final decree, which was entered without notice to the appellants, provided a period of 12 months for presenting bonds for payment, otherwise payment would be barred (R. 36, case No. 10934). The appellants through what they claimed was excusable neglect failed to present their bonds within the period provided in the final decree and on August 18, 1944, filed a motion for an order to modify the provisions and terms of the final decree to provide an extension of time for the trustees to present their bonds. This motion was denied by the District Court on September 19, 1944 (R. 64, case No. 10934). From this order an appeal was taken and the decision below was reversed in the case of *Bekins v. Compton-Delavan Irrigation District*, 150 Fed. (2d) 526. After denial of petition for writ of certiorari by the United States Supreme Court (326 U.S. 772, 66 S. Ct. 230)

the mandate of this court went down to the court below and was filed December 12, 1945 (R. 4). This mandate commanded the reversal of the order from which the appeal had been taken and that such further proceedings be had in said cause as would be proper (R. 3). Thereupon the District Court entered an order granting a motion to modify the final decree on January 25, 1946 (R. 6).

The terms of this order are of extreme importance, as the order provided that the final decree be modified to extend the time for deposit of the bonds and providing that the trustees might have thirty days after the entry of such order to present to the Treasurer of the district the eleven bonds with the coupons and that *"upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of \$2200.00 upon said bonds and coupons with deductions for missing coupons, if any be missing, as provided in the said final decree and in the interlocutory decree heretofore entered herein, and shall also pay to said trustees the sum of \$161.60 costs taxed herein, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein"* (R. 6).

It is to be observed that counsel for the district disapproved of this form of order (R. 7) and that notice of the lodgement thereof had been properly

given (R. 8). Furthermore, the trustees gave notice of the entry of the order (R. 9).

The record shows (R. 13) that the trustees had the bonds presented to the Treasurer of the Compton-Delevan Irrigation District on March 25, 1946 for surrender and cancellation upon payment of the \$2200.00 (\$200.00 per \$1000 bond and appurtenant coupons) together with \$161.60 costs as provided in the order (R. 13), and when payment was refused the bonds and coupons remained on deposit with a bank in Chico, California where the Treasurer's office is located, with instructions to deliver them upon request to the treasurer of the district, until after May 21, 1946 (R. 13) which was beyond the time limit provided for payment in the order (R. 6).

Payment of the amount provided by the plan of composition having been refused by the district, application for leave to sue on the bonds was made to the District Court June 13, 1946 (R. 10, 12). The Trustees took the position that they were freed of the composition proceeding as provided in the court's order because of the failure of the district to make the payment provided by the plan of composition.

The district made an answer to this application by the affidavit of Mr. Peters (R. 15). This answer admitted that the bonds had been presented March 25, 1946 and had not been paid (R. 19) but set up the defense that at the time of the presentation of the bonds the district did not have sufficient funds to pay, and that it was necessary for them to borrow

from the Reconstruction Finance Corporation in order to make payment (R. 20). It further set forth the difficulties of the district in attempting to secure funds to make the payment required, and asked that the court modify the final decree to permit the district to set up the defense that the final decree did not intend to give the Bekins Trustees the right to recover the full face value or to be freed from the composition proceedings (R. 20-25). This affidavit was dated November 13, 1946.

Further affidavits were made by the parties and the application of the trustees for leave to sue and the application of the district for an order modifying the final decree were submitted to the court.

The District Judge filed what was called an Opinion and Order which appears to be a preliminary opinion (R. 34-43). This opinion was dated April 23, 1947 and recited that two matters were submitted to the court: 1. The application of the district for an order interpreting the order made January 25, 1946, and 2. The application for leave to sue by the trustees, and provided that upon determining certain matters the court would make a further order, with conditions to be named in the order (R. 42). Subsequently on June 19, 1947 the District Judge filed its "Findings and Order" (R. 48) wherein it recited that the trustees having filed their application for leave to sue and the district having also filed a motion for interpretation of the court's order modifying the final decree, which order was made and entered January 25, 1946, and that having passed upon the mo-

tions by preliminary order made April 24, 1947, the court finds from the affidavits that the district failed "to accept and pay the composition value of the bonds" of the trustees and as a result of the failure the trustees filed their motion for leave to sue and the district filed its motion for interpretation of the order of January 25, 1946 and ordered: "It Is Hereby Ordered that Compton-Delevan Irrigation District pay into the registry of this Court the sum of \$385.00 as and for a reasonable counsel fee and costs which the Court awards to the Bekins Trustees in this matter, and upon said sum being paid, this Court will make its final order denying the trustees leave to sue." (R. 47, 48).

This order appears to be a preliminary and conditional order.

On July 16, 1947, the court entered a final order in which it recites: "It is hereby finally ordered that the petition or application of the Bekins Trustees to sue be and the same is hereby denied", (R. 50-51).

Thereupon the trustees appealed, filing their notice August 21, 1947. No notice of the entry of the last mentioned order was given.

At the outset it should be noted that a former appeal was taken in this cause as stated above, the number in this court being 10934 and by order of this court the transcript of record in the former case is not reprinted but is a part of the record on appeal here (R. 60). References to the record in the former case will be distinguished by using the number of that

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filed a motion for an order to modify the provisions and terms of the final decree to provide an extension of time for the trustees to present their bonds. This motion was denied by the District Court on September 19, 1944 (R. 64, case No. 10934). From this order an appeal was taken and the decision below was reversed in the case of *Bekins v. Compton-Delevan Irrigation District*, 150 Fed. (2d) 526. After denial of petition for writ of certiorari by the United States Supreme Court (326 U.S. 772, 66 S. Ct. 230) the mandate of this court went down to the court below and was filed December 12, 1945 (R. 4). This mandate commanded the reversal of the order from which the appeal had been taken and that such further proceedings be had in said cause as would be proper (R. 3). Thereupon the District Court entered an order granting a motion to modify the final decree on January 25, 1946 (R. 6).

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pay to said trustees the sum of \$161.60 costs taxed herein, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein.” (R. 6).

It is to be observed that counsel for the district disapproved of this form of order (R. 7) and that notice of the lodgement thereof had been properly given (R. 8). Furthermore, the trustees gave notice of the entry of the order (R. 9).

The record shows (R. 13) that the trustees had the bonds presented to the Treasurer of the Compton-Delevan Irrigation District on March 25, 1946 for surrender and cancellation upon payment of the \$2200.00 (\$200.00 per \$1000 bond and appurtenant coupons) together with \$161.60 costs as provided in the order (R. 13), and when payment was refused the bonds and coupons were returned to the trustees, but were sent back to Chico, California, where they remained on deposit with a bank in Chico, where the Treasurer's office is located, with instructions to deliver them upon request to the treasurer of the district, until after May 21, 1946 (R. 13) which was beyond the time limit provided for payment in the order (R. 6).

Payment of the amount provided by the plan of composition having been refused by the district, application for leave to sue on the bonds (the principal

subject of this appeal) was made to the District Court June 13, 1946 (R. 10, 12). The Trustees took the position that they were freed of the composition proceeding as provided in the court's order because of the failure of the district to make the payment provided by the plan of composition.

The district made an answer to this application by the affidavit of Mr. Peters (R. 15). This answer admitted that the bonds had been presented March 25, 1946 and had not been paid (R. 19) but set up the defense that at the time of the presentation of the bonds the district did not have sufficient funds to pay, and that it was necessary for them to borrow from the Reconstruction Finance Corporation in order to make payment (R. 20). It further set forth the difficulties of the district in attempting to secure funds to make the payment required, and asked that the court modify the final decree to permit the district to set up the defense that the final decree did not intend to give the Bekins Trustees the right to recover the full face value or to be freed from the composition proceedings (R. 20-25). This affidavit was dated November 13, 1946.

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This order appears to be a preliminary and conditional order.

. On July 16, 1947, the court entered a final order which orders: "It is hereby finally ordered that the petition or application of the Bekins Trustees to sue be and the same is hereby denied", (R. 50-51).

Thereupon the trustees appealed, filing their notice of appeal August 21, 1947. No notice of the entry of the last mentioned order was given.

EVIDENCE.

The evidence aside from the record of the case itself is contained in 1, the application and affidavit of trustees for leave to sue filed October 7, 1946 (R. 14); 2, affidavit by Jerome Peters, counsel for the district, dated November 13, 1946 (R. 25); 3, affidavit of W. Coburn Cook, attorney for trustees, dated January 3, 1947 (R. 66); 4, affidavit of Mr. Peters dated February 4, 1947 (R. 30); 5, closing affidavit by Mr. Cook dated February 19, 1947 (R. 34).

One of the points in dispute was the availability of funds. Mr. Peters in his affidavit states that on August 24, 1943 a report was made by the registrar of the court disclosing that there remained \$7040 of the original funds left in the hands of the registrar for payment of bonds (R. 17) and that this money was used to liquidate refunding bonds of the district, except for a small balance of \$195.42 which was returned to the district (R. 18). This report was made about the time the Bekins Trustees originally filed their motion to be allowed to receive the composition figure,

which was on July 28, 1943 (R. 18). Mr. Peters further states that to secure funds the district on March 27, 1946 sought to borrow money from the Reconstruction Finance Corporation and on April 4, 1946, the Reconstruction Finance Corporation wrote to the district (R. 20). On May 4, 1946 the district passed a resolution to borrow money from the Reconstruction Finance Corporation.

It will be observed that these later dates are at the time when the trustees had presented their bonds to the treasurer of the district and left the bonds on deposit with the bank for much longer than the thirty days required by the order of the court. However, it nowhere appears in the evidence that the treasurer gave any reason or explanation to the trustees or the bank as to why payment could not be made, and the fact is that no explanation was made. The District Judge stated in his opinion (R. 36) the district, when it did not pay gave as its reason want of requisite funds. It doesn't appear that the Bekins ever received any statement as to the reason for refusal to pay. Without question an arrangement could have been made between the trustees and the district for credit or extension of time or for the acceptance of a warrant. This is shown by the fact that the trustees left the bonds on deposit from March 25, 1946 until May 21, 1946 and in fact sent the bonds back to the bank after they had been returned to the trustees. The correspondence between the R.F.C. and the district shows no substantial effort to get money. The court in *Bekins v. Compton-Delevan Irrigation Dis-*

trict, 150 Fed. (2d) 526 had determined that this money did not belong to the district yet the district had as shown above used this money to pay off other bonds and furthermore it actually had money amounting to several thousand dollars and more than enough to pay Bekins in a bond reserve fund (R. 20). The district contended that it could not use this money or any other money it had because of its contract with the R.F.C., yet it had paid money to the R.F.C. in redemption of bonds which the court said belonged to Bekins. What irrigation act would be involved in taking money out of the reserve fund which belonged to the Reconstruction Finance Corporation or was marked for the Reconstruction Finance Corporation to offset the money it had illegally paid the Reconstruction Finance Corporation belonging to Bekins?

No satisfactory explanation for the failure to pay has been shown. The district could have taken the money out of the bond reserve fund. It could have made an arrangement with Bekins. It could have levied an assessment. It could have issued a warrant. It could have borrowed money on warrant (Water Code Sections 24626-7-8).

“Warrants payable at a future time or times may be issued in consideration of money loaned to the district for the purchase of any of its outstanding bonds or the refinancing or retiring of any outstanding contract. The annual interest payable on these warrants shall be less than the annual interest on the bonds purchased or contract refi-

nanced or retired with the proceeds of the warrants." *Water Code*, Sec. 24628.

Considerable has been said about the question whether there was a valid board of directors. At page 21 of the Record Mr. Peters states that on June 19, 1946 the Board stated it was resigning and on June 8, 1946 two of the board members did resign and stated also that no landowners reside within the district, and under the law the directors are appointed by the Board of Supervisors in such situations (R. 21).

The point here is merely that if there was no valid board of directors, then how could it make the deposit of \$2200 with the court? And that brings up the further question that no explanation is made as to how it could get the \$2200 suddenly to deposit with the court at the time of the hearing of the trustees' motion when it could not get it before? The registry docket shows \$2200 received from the Compton-Delevan Irrigation District on November 14, 1946 (R. 67), following the filing of the official bonds by the two directors on October 22, 1946 (R. 22).² Yet the last we hear as to money from the R.F.C. is that in May, 1946 the R.F.C. suggested a new loan or the promise to use the district's bond reserve fund (R. 20). If the district could put this money up in November, 1946, it could have put it up in March, 1946.

²At R. 28 Mr. Peters says the first meeting of the Board after June 1946 was held November 6, 1946.

The rest of the argument raised by the defense merely relates to the effect of the judge below lopping off from the order of January 26, 1946 certain provisions which had been proposed in the order as set forth at R. 23. This particular aspect of the matter will be discussed later. Something is said about equity. It is not clear how equity has any application in this matter. It does not appear that there was any equity for the Bekins trustees to do. It had always been a case of the district itself failing to do equity. They did not even offer to pay any costs, attorney's fees, interest or damages to the trustees when they asked the court to modify the final decree.

THE COURT'S ORDERS.

There is a little confusion in the entry of the orders. The court made what was called "Opinion and Order" on April 23, 1947 (R. 34, 43) and on June 19, 1947 findings and order were entered (R. 47, 48) and then a final order was entered July 16, 1947 (R. 50, 51). It will be observed that while it is indicated that the court granted the application of the district to amend the final decree there is no actual order setting forth any such amendment or special interpretation. Consequently the trustees appealed from the final order of July 16, 1947 (Notice of Appeal filed August 21, 1947, R. 52), without waiting for the presentation of any amendment or interpretation.

The court's reasoning in the matter is set forth in its opinion commencing at R. 34. The court expresses the opinion that the bankruptcy court has no terms, sits continuously and applies doctrines of equity (R. 38), citing as the principal case *Wayne United Gas Co. v. Owens-Illinois Glass Co., et al.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557 (R. 38). The court also seems inclined to the view that the other provisions of the bankruptcy act govern the municipal bankruptcy act (R. 38), and cites the case of *Poinsette Lumber and Manufacturing Co. v. Drainage No. 7 of Poinsette County, Arkansas, et al.*, 119 Fed. (2d) 270 as authority for the proposition that the resources of a district come within exclusive jurisdiction of the bankruptcy court (R. 39). The entire proceeding the court says should be viewed in the light of equitable principles. The former case of *Bekins v. Compton-Delevan* is referred to. The judge at R. 41 appears to the trustees to say that the words of his predecessors "upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or the interlocutory decree herein" (R. 41) do not have the meaning which they seem by their own words to impart. The judge says also that the order exceeded the extent of the mandate (R. 42).

Necessarily our argument will be directed to a refutation of the basis of this opinion.

ARGUMENT.

THE COURT ERRED IN ITS OPINION THAT THE APPLICATION OF THE DISTRICT FOR INTERPRETATION OF THE ORDER OF JANUARY 25, 1946 SHOULD BE GRANTED AND ERRED IN MAKING ITS ORDER DENYING THE TRUSTEES LEAVE TO SUE.

It appears to the appellants that the points on appeal can best be discussed under one heading, but the points which have been set forth (R. 52) are each of them maintained and for that purpose are set forth in the appendix (See Appendix). It appears to us that the case of *Bekins v. Compton-Delevan Irrigation District*, 150 Fed. (2d) 526 turned upon the legal point that no notice had been given of the entry of the final decree.

It appears to us that the case of *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, supra, is not in point and that the discussion set forth in *American United Life Ins. Co. v. Haines City, Fla.*, 117 Fed. (2d) 574, takes into consideration, which the *Wayne* case could not, the change in rules and amendment of the bankruptcy act. It appears to us also that *American United Life Ins. Co. v. Haines City, Fla.*, is not to be followed in preference to the decision of this circuit in *Newhouse v. Corcoran Irrigation District*, 114 Fed. (2d) 690. When this court issued its mandate following the former *Bekins* appeal, the order of January 26, 1946 was made. Due notice of this order was given to the district (R. 9) and the district was quite concerned over it because it specifically objected to the language under discussion (R. 7). The disapproval of counsel asked that there be stricken

from the order modifying the final decree the words "upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by terms of the final decree or interlocutory decree herein" (R. 7).

No appeal was taken from the order within the time allowed by law. No motion of any kind was made when the bonds were presented for payment, and no request for time was made by the trustees nor by the district. It was only when several months later upon the application of trustees for leave to sue that the district asked for modification of the final decree.

The district is barred by the provisions of Rule 60 of Federal Rules of Civil Procedure. The motion came too late. *Wallace v. United States*, 142 Fed. (2d) 240, certiorari denied 65 S. Ct. 37, 323 U. S. 712.

The six months expressly fixed by this rule governing relief against judgment or other proceedings is the outermost limit of a reasonable time fixed by this rule within which the motion must be filed, and motion must be denied unless made before six months after entry of judgment or order. *McGinn v. U. S.*, D. C. Mass. 1922, 2 F.R.D. 562. The California rule is regarded as the original of this rule and the decisions applying in California are instructive determining the meaning of this rule. *Leadwith v. Storkan*, D. C. Nebr. 1942, 2 F.R.D. 539. Before the enactment of these rules the courts did have power to correct errors

in judgment and decrees, but afterwards they are bound by the rules. *Idem*.

The Court modified the final decree on January 25, 1946 as required by the mandate. From such an order so entered in accordance with the mandate there is *no* appeal. *Tyler Mining Co. v. Last Chance Min. Co.* (CCA 9), 97 Fed. 394.

O'Brien Manual, 3rd Ed., 1941, p. 241: Even where there is an appeal from an order entered after the Mandate the second appeal cannot bring up any of the questions which were before the court before. *Republican Min. Co. v. Tyler Min. Co.* (CCA 9), 79 F. 733; *Mathews v. Columbia Nat. Bank of Tacoma et al.* (CCA 9), 100 F. 393; *Olsen v. North Pacific Lumber Co.* (CCA 9), 119 F. 77.

In the case of *Berry v. Root*, 148 Fed. (2d) 945, the Circuit Court of the 5th Circuit, in a municipal bankruptcy proceeding, held that while a court of bankruptcy often applies equitable principles, and may sometimes entertain a controversy in equity arising out of bankruptcy, in which it will follow precedents and practice of courts of equity, yet as respects original bankruptcy proceedings it is not a court of equity but a statutory court created by the bankruptcy act and governed by it.

Therefore, the bankruptcy court cannot change the terms of the statute but must apply the terms of the statute.

There is no question of giving preference or priority to the trustees. The use of that word is entirely

a misnomer. What has happened in this case is that other creditors either accepted the plan of composition and turned in their bonds or became bound by it and turned in their bonds. Here the trustees sought to obtain the benefits of the plan of composition and to turn in their bonds but were refused payment, even after the Circuit Court of Appeals in the appeal from the previous order had ruled that the moneys involved belonged to the creditors and not to the district and therefore the creditors could participate. Even then the Compton-Delevan Irrigation District refused to pay the money over to the trustees, and it will be observed also that the trustees even gave an extension of time on the deposit of their bonds and would have accepted the money even after the expiration of that time, but waited until it became entirely apparent that no payment was to be made. It is our belief that the idea of the Compton-Delevan Irrigation District and its officials was to continue to refuse to make the payment and to harass and annoy those creditors because they had been bold enough to take an appeal and to prosecute their appeal to the Circuit Court of Appeals. That was some sort of punishment which the district was going to inflict upon them. The district did not come in and make any explanation of this course of conduct. The district officers have not been fair, they have not done equity, they come into court with the dirtiest of hands. Now, at last, when they saw the possibility of something happening to prevent the continuance of their punishment and annoyance of the trustees did they at-

tempt to say at long last they have the money and they wish to pay.

There is no seeking of priority or preference. The bonds upon which this claim is based represent good and full value. They were purchased by the Bekins heirs (trustees) at close to a thousand dollars a bond. No interest has been paid upon them for years. We might suggest, too, that if these bankruptcy proceedings had been inaugurated during the present good era of prices the bankruptcy would never have been annulled. The district and its landowners have made hundreds of thousands of dollars out of the repudiation of this debt. The trustees will receive no preference and no priority. They will merely be paid what is due them if they can get it.

There was a specific reason why the Congress placed a limitation and restriction upon the power of the bankruptcy court with respect to the composition proceeding. There had been a long and sustained attack upon the constitutionality of the municipal bankruptcy act, and the United States Supreme Court had held the first municipal bankruptcy act unconstitutional in the case of *Ashton v. Cameron County*, 298 U.S. 513, 56 S. Ct. 892. Only after a new statute was passed and the personnel of the Supreme Court had changed did that court hold the new municipal bankruptcy act constitutional in *U.S. v. Bekins*, 304 U.S. 27, 58 S. Ct. 811 (the same Bekins). One of the strongest arguments in the cases that went to the United States Supreme Court on constitutionality was that an irrigation district was an agency and in fact

branch or arm of the state government, and that it could not be subjected to bankruptcy. The court however held that it had jurisdiction over contracts and over creditors and that if a state agency with the consent of the state entered into a contract with its creditors, the bankruptcy court could compel the acceptance of the terms of the composition by the creditors, although it could not compel the acceptance of the terms of the contract by the state agency. Consequently we find in the statute the provision in Title 11, Sec. 403 (f):

“If an interlocutory decree confirming the plan is entered as provided in Subdivision (e) of this section, the plan and said decree of confirmation shall become and be binding upon all creditors affected by the plan, if within the time prescribed in the interlocutory decree, or such additional time as the judge may allow, the money, securities, or other consideration to be delivered to the creditors under the terms of the plan, shall have been deposited with the court or such disbursing agent as the court may appoint or shall otherwise be made available for the creditors.”

In other words, the provision of the statute is that *if* the district shall make the consideration available within the time prescribed by the court, or such additional time as the court may allow, then it shall be binding upon the creditors. Otherwise they are not bound. Now in this instance the court below, after more than careful consideration, induced we would suggest by the fact that the case itself had already gone to the Circuit Court of Appeals (*Bekins v.*

Compton-Delevan Irrigation District, 150 Fed. (2d) 526), and was back upon reversal, and under the provisions of the mandate, and after the specific objection of the district to the very provisions which it now seeks again to have changed, made a direct positive order of limitation of time as provided in the statute. And the Court recited in the order a thing which the section itself provided, that the plan of composition should be binding upon the creditors only if the debtor made the consideration available within the time prescribed in the decree. We submit that the order made by the court placing a limitation upon the time within which the Compton-Delevan Irrigation District was to put the money up was proper, lawful and in accordance with the intent of the statute itself. We maintain also that that time could not be extended after it had elapsed. It is the general concept of the law that the time within which something may be done, even if it can be extended while the time is still running, cannot be extended after it has run.

It cannot be argued that Judge Welsh did not intend that the provision "upon failure * * * of said District * * * to make such payment * * *, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein," should be in the order from the fact that he cut off from the tail end of the proposed order the provisions reading: "And the provisions of said decrees restraining them from pursuing their ordinary remedies upon said bonds in the state or federal courts shall

be vacated and set aside and permission is granted to said trustees to take proceedings for the collection of said bonds in full and enforcement of their rights thereon free from the restraint of the interlocutory and final decrees of this court in these proceedings."

The judge's intention can be read from what he did. He was not going to write into the order at that time, although we thought that he should, a provision stating exactly what we would be entitled to do if the debtor failed to put the money up within the time allowed, but he did specifically put a provision into his order that the trustees should be relieved from the binding effect of the bankruptcy proceeding if the money was not paid within the time provided by the court.

The judgment of the court cannot be modified by extrinsic evidence. *American National Bank and Trust Co. of Chicago v. U. S.*, 142 Fed. (2d) 571.

It is our position that the order was *res judicata* and could not be set aside or amended when the application was made. *Chicot County Drainage District v. Baxter State Bank*, 60 S. Ct. 317, 308 U. S. 371. The cited case was one which was far reaching, for it involved a proceeding under the bankruptcy act which had been declared unconstitutional subsequent to the date of the entry of the interlocutory decree. The creditors came back and maintained that since the act was unconstitutional the decree should be set aside. The court held that the time for appeal had gone by and it was too late to raise any question of constitutionality; that even if the law were unconstitutional

the judgment had been entered and would have to stand.

Now it cannot be said in the instant case that the Compton-Delevan Irrigation District knew nothing about the order that had been entered or that its procedural rights were in any way infringed or that it did not have an opportunity, full and complete, to protect itself. Notice of the entry of the order was served upon the district and the judge had already advised counsel exactly what he intended to do about the objections. The district should not have been permitted at the late date to come in when it did not make any showing of excusable neglect or anything of that sort or in any way come within the provisions of Rule 60 of Federal Rules of Civil Procedure providing for setting aside an order or judgment within the six months' period.

It is quite obvious that the time for appeal had expired. The order in question was entered on January 25, 1946 and the time for taking the appeal expired within thirty days after the notice was given. (See *Dupont v. Okeechobee County, Fla.*, 135 Fed. (2d) 577, certiorari denied 64 S. Ct. 66, 320 U. S. 751; *Jordan v. Palo Verde Irrigation District*, 105 Fed. (2d) 601.) Thereupon the order became final.

It may be that the creditor could have come in within a six months' period and claimed some relief under the provisions of Rule 60 *supra*, but the time within which it should do that had expired, and no showing has been made of any neglect, inadvertence, nor is any other fact set forth why it should be per-

mitted to make this attack upon the order. All that it asks in fact is an amendment of the order. The order in question is now a part of the final decree.

The striking from the proposed order of the words above referred to only strengthens the position that the judge considered the matter and did not intend to strike out the provisions that the district now complains of.

We refer again to the provision of the statute which itself says that if the money is not put up within the time required that the creditor is not bound by the bankruptcy decree.

It will be observed that the decree or order made in a municipal bankruptcy proceeding must be careful not to interfere with the governmental or political affairs of the district (*U. S. v. Bekins*, supra). It is for that reason that it is not possible for the federal court to say flatly in a municipal bankruptcy proceeding that the district shall pay the money. It can only say that the district shall pay the money within a certain time or it shall not be discharged from the debt involved.

After a mandate has come down and a judgment or order has been made pursuant to the mandate, the only remedy that we know of which can help the injured party if the order or judgment entered does not happen to be in accordance with the mandate, is to take a new appeal from such an order or judgment (as in *State of Texas v. Tabasco Consolidated School District*, 142 Fed. (2d) 58; O'Brien Manual of Federal Appellate Procedure, supra, page 241).

This district compelled its creditors to accept \$200 on each \$1000 plus years of unpaid interest. If one creditor perchance recovers more, no great harm is going to happen. We do not refer to these facts as any reason why our position should be sustained, but refer to them merely because we do not wish the court to be under the impression that any calamity of any kind whatever is going to occur if these creditors receive payment in full. In fact one might suppose that those who did get their money have probably done pretty well on it during this period of time, whereas these creditors not only have not received their money but are not even offered any compensation for the delay.

We reiterate, we do not think the case of *Wayne United Gas Co. v. Owens*, 300 U. S. 131 applies here whatsoever. That case was decided before the effect of Rule 60 of Federal Rules of Civil Procedure was realized or determined. We refer to the case of *Norris v. Camp, City Treasurer*, 144 Fed. (2d) 1 for a discussion of this matter. This case was decided October 9, 1944. In it the court says that prior to the effective date of General Order No. 37 (11 U.S.C. following Section 53) a court of bankruptcy had the power to revise its judgment on reasonable application, but declared that General Order No. 37 made the Rules of Civil Procedure apply to bankruptcy procedure, and then quotes Rule 60(b) and the court states that the six months' period having expired the lower court had no power to modify its order and final judgment.

CONCLUSION.

Wherefore, we respectfully represent that the order below should be reversed with directions to grant the trustees leave to sue.

Dated, Turlock, California,
January 5, 1948.

Respectfully submitted,
W. COBURN COOK,
Attorney for Appellants.

(Appendix Follows.)

Appendix.

Appendix

STATEMENT OF POINTS AND ASSIGNMENT OF ERRORS ON APPEAL.

The appellants, Milo W. Bekins and Reed J. Bekins as trustees under the last will and testament of Martin Bekins, Deceased, make the following assignment of errors which they aver occurred in the determination of this proceeding and in the rendering of the decrees appealed from, and state that the points on which they intend to rely on the appeal of this cause are the following:

1. The court erred in denying the application of the Bekins trustees for leave to sue upon the bonds held by the trustees.

2. The court erred in granting the application of the Compton-Delevan Irrigation District for an order interpreting the order of the court made January 25, 1946.

3. The court erred in holding that it had continuing jurisdiction in the matter of the bankruptcy plan.

4. The court erred in holding that the Rules of Civil Procedure for Federal Courts do not restrict the continuing jurisdiction of the court.

5. The District Court did not have power to change or modify the order of January 25, 1946, made pursuant to the mandate of the Circuit Court of Appeals in the prior appeal after the expiration of the time provided in the Rules of Civil Procedure.

6. The court was without power to interpret the order of January 25, 1946, after the expiration of the

time provided in Rule 60 of the Rules of Civil Procedure in such a manner as to nullify the effect of the order.

7. The evidence was insufficient to sustain the finding of the District Court that the Compton-Delevan Irrigation District could not have paid the amount due the trustees prior to the time when the moneys were deposited with the registry of the court.

8. The court erred in determining and holding in effect that until moneys were borrowed from the Reconstruction Finance Corporation the Compton-Delevan Irrigation District could not otherwise furnish the moneys due the trustees.

9. The court erred in determining in effect that equitable reasons were evidenced and shown as a foundation for the court's order.

10. The court was in error in determining and holding that it had exclusive or any jurisdiction of the resources of the debtor.

11. The court erred in not applying the provisions of the Municipal Bankruptcy Act which provide that upon the failure of the debtor to furnish the consideration for the composition the creditor is no longer bound by the plan.

12. The court erred in determining and holding that there were no officers of the district who could act to provide the moneys due the trustees prior to the hearing in this matter.

Dated, September 4, 1946.

W. Coburn Cook,
Attorney for Appellants.

No. 11,737

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

MILO W. BEKINS and REED J. BEKINS
as Trustees under the Last Will of
Martin Bekins, Deceased,
Appellants,

VS.

COMPTON-DELEVAN IRRIGATION DIS-
TRICT,
Appellee.

BRIEF FOR APPELLEE.

PETERS AND PETERS,
304 Broadway, Chico, California,
Attorneys for Appellee.

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Appellants,

VS.

COMPTON-DELEVAN IRRIGATION DIS-
TRICT,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The statement of facts set forth in the brief of appellants is essentially correct.

The final decree which was entered August 17, 1942, in the Compton-Delevan Irrigation District bankruptcy matter, provided that the dissenting bondholders present their bonds for surrender and receive the composition figure within a period of twelve months from the date of the decree, and in the event they were not presented within such period to the Registrar of the Court, they were forever barred from participating in the plan of composition or in the funds held in the Registry of the Court.

The appellants failed to present their bonds within one year of the date of the final decree; however, after the date of the final decree and after the date of the expiration of twelve months from the date of the final decree, they did seek to present their bonds and be paid.

This effort was in January, 1944, some five months after the time limit placed by the Court in its final decree on the bondholders' rights to present bonds and receive payment, but within six months of such limit.

At the time of appellants' request, the district did not have any of the money to effect the composition; the balance that had remained in the Registry of the Court after the final date fixed by the Court for presentation and payment had been forwarded by the Registrar of the Court to the Reconstruction Finance Corporation in Washington in pursuance of the Court's order contained in the final decree. (R. 36, Case No. 10,934.)

Because of the foregoing, appellee rejected the presentation of appellants' bonds and refused to pay to appellants the composition figure. Thereafter and upon August 18, 1944, appellants filed with the District Court a motion that appellants be permitted to surrender their bonds in \$11,000.00 principal amount, and receive the composition figure therefor, namely, \$2,200.00, and that the final decree be modified to that effect. (R. 38, Case No. 10,934.)

Thereafter and upon September 19, 1944, the District Court entered its order denying the motion of appellants to modify the terms of the final decree.

Thereafter, upon October 10, 1944, appellants appealed to this Court from the decision of the District Court; the matter being heard and considered, this Court upon the 11th day of December, 1945, reversed the decision of the lower Court and in its mandate stated:

“That the order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellants and against the appellee, and that this cause be, and hereby is remanded to the said District Court with directions to grant appellants’ motion to modify the terms of the final decree.” (R. 2, 3.)

Appellants’ first motion to modify the final decree which this Court ordered granted as aforesaid, reads as follows:

“MOTION

Milo W. Bekins and Reed J. Bekins, as trustees appointed by the will of Martin Bekins, deceased, move the court for an order requiring the Compton-Delevan Irrigation District and the depositary to pay to movents \$2200.00 upon surrender and deposit of \$11,000 principal amount of bonds of Compton-Delevan Irrigation District, together with appurtenant unpaid coupons maturing January 2, 1932 and subsequent, being bonds 409, 410, 411, 413, 414, 415 of the original issue, and bonds R136, R137, R138, and R139 of the refunding issue, each of the par value of \$1000 and, if necessary for that purpose, to modify the terms of the final decree and to extend the time thereof for the deposit of said bonds and if necessary for that purpose, to relieve movents from their default, if any herein,

and to grant them the right to appear and claim the payment provided by the Plan of Composition despite the provisions of the final decree. Said motion is made upon the annexed statement, affidavit, and (25) authorities." (Tr. 10,934, pp. 38-39.)

Appellee sought a writ of certiorari from the United States Supreme Court, which writ was denied.

Thereafter, as set forth above, this Court issued a writ of mandate to the District Court to modify the final decree. (R. 2, 3.)

In pursuance of rule 3 of the District Court rules, appellant presented to the District Court a proposed order modifying the final decree, and served a copy upon appellee. This proposed order reads as follows (Sup. Tr. 11,737, pp. 78-80):

“PROPOSED ORDER GRANTING MOTION
TO MODIFY FINAL DECREE

In this matter the Mandate of the United States Circuit Court of Appeals for the Ninth Circuit having come down directing this court to grant the motion of Milo W. Bekins and Reed J. Bekins, as trustees appointed by the will of Martin Bekins, Deceased, for an order requiring the Compton-Delevan Irrigation District to pay said trustees \$2200.00 upon surrender and deposit of \$11,000 principal amount of bonds of said district, with appurtenant coupons, and to modify the terms of the final decree entered herein to extend the time for depositing said bonds and to relieve the said parties from their default, if any herein,

Now, therefore, upon application of said movents It Is Ordered, Adjudged and Decreed that the final decree entered herein August 17, 1942, be and the same is hereby modified to extend the time for deposit and surrender of said bonds as herein provided and that the said trustees may, within thirty (30) days after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, the petitioner herein, bonds numbers 409, 410, 411, 413, 414 and 415 of the original issue of bonds of said district, and bonds numbers R115, R136, R137, R138, and R139 of the Refunding issue of said District, each of the par value of \$1000, together with appurtenant unpaid coupons maturing January 2, 1932, and subsequent, and upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of \$2200.00 upon said bonds and coupons with deductions for missing coupons, if any be missing, as provided in the said final decree and in the interlocutory decree heretofore entered herein, and shall also pay to said trustees the sum of \$161.60 costs taxed herein, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein, and the provisions of said decrees restraining them from pursuing their ordinary remedies upon said bonds in the State or Federal Courts shall be vacated and set aside and permission is granted to said trustees to take proceedings for the collection of said bonds

in full and enforcement of their rights thereon free from the restraint of the interlocutory and final decrees of this court in these proceedings.”

Appellee objected to the form of the order, and the District Court struck from the “proposed order” the following (Tr. 11,737, pp. 5-6):

“and the provisions of said decrees restraining them from pursuing their ordinary remedies upon said bonds in the State or Federal Courts shall be vacated and set aside and permission is granted to said trustees to take proceedings for the collection of said bonds *in full* and enforcement of their rights thereon free from the restraint of the interlocutory and final decrees of this court in these proceedings.”

STATEMENT OF THE CASE.

The statement of the case as set forth in appellants’ brief is also essentially correct. The bonds of appellants were presented for payment and surrender and they were not paid within the thirty days limit set forth in the order modifying the final decree. On June 13, 1946, appellants made application to sue on the bonds for their full value. (R. 10-12).

The bonds owned by appellants were of a face value of \$11,000.00; the composition figure under the plan of composition and as fixed in the interlocutory and final decrees, was \$200.00 per \$1,000.00 bond. At the composition figure appellants were entitled to \$2,200.00.

In opposition to the application to sue appellee applied to the District Court for an order interpreting the order of the court modifying the final decree and in interpreting it the court interpreted it to mean and read as follows, to-wit:

“Now, therefore, upon application of said movents, it is ordered, adjudged and decreed that the final decree entered herein August 17, 1942, be and the same is hereby modified to extend the time for deposit and surrender of said bonds as herein provided and that the said trustee may, within thirty (30) days after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, the petitioner herein, bonds numbers 409, 410, 411, 413, 414 and 415 of the original issue of bonds of said district, and bonds numbers R115, R136, R137, R138 and R139 of the refunding issue of said district, each of the par value of \$1000, together with appurtenant unpaid coupons maturing January 2, 1932 and subsequent, and upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of \$2200.00 upon said bonds and coupons with deductions for missing coupons, if any be missing, as provided in the said final decree and in the interlocutory decree heretofore entered herein, and shall also pay to said trustees the sum of \$161.60 costs taxes herein, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein, excepting that

they shall be bound by the composition figure determined by said decree to be the maximum figure the district is able to pay, to-wit, twenty cents on each dollar." (R. 39.)

Appellants' motion for leave to sue and appellee's motion for interpretation of the modifying order resulted in the court's decision and order denying appellants' motion for leave to sue and granting the motion of Compton-Delevan Irrigation District to interpret the final decree. (R. 50, 51.)

Previously the court had entered a preliminary order to the same effect; this order was upon April 24, 1947, and in which the court denied the petition of the Bekins' trustees to sue and granted the motion of Compton-Delevan Irrigation District to interpret the final decree, and in which also the court stated it was of the opinion that the district should pay to the Bekins' trustees counsel fees and costs in a reasonable sum and suggested that the respective parties arrange and agree upon such sum or submit it to the court upon affidavit. (R. 42-43.) The matter was submitted upon affidavits. The court, having considered the affidavits, upon June 19, 1947, entered its order that the district pay to the registry of the court the sum of \$385.00 as and for a reasonable counsel fee and costs, and further stated that upon such sum being paid, the court would make its final order denying the Bekins leave to sue. The said sum of \$385.00 was deposited with the registry of the District Court by the district upon June 25, 1947. (R. 54.)

feature of the interlocutory decree but could sue for the composition figure.

It is to be noted that the court deleted and struck from the proposed order presented by appellants the closing sentence which immediately followed the last quotation, and which sentence reads as follows:

“* * * the provisions of said decrees restraining them from pursuing their ordinary remedies upon said bonds in the State or Federal Courts shall be vacated and set aside and permission is granted to said trustees to take proceedings for the collection of said bonds *in full* and enforcement of their rights thereon free from the restraint of the interlocutory and final decrees of this court in these proceedings.”

The interlocutory enjoined outstanding bondholders, pending the final decree, from bringing legal proceedings. (R. 31, Case 10,934.)

The final decree provided that such holders who did not present their bonds within the time provided therein, be forever restrained and enjoined from asserting any claim and demand whatsoever therefor as against the petitioning district or its officers, or against the property situated therein or the owners thereof. (R. 37, Case No. 10,934.)

The order modifying final decree was entered January 25, 1946; appellants filed their motion for leave to sue on October 7, 1946; appellee filed its application for interpretation of the order modifying the final decree on November 14, 1946.

Unfortunately in the interim between the signing of the order modifying final decree and the time the proceedings of the parties were filed in October and November, Judge Martin I. Welsh, Judge of the District Court, who signed the modifying order became ill; he never again returned to the bench; thus the parties are without the benefit of Judge Welsh's clarification as to what he meant by the terms of the order. (R. 23.)

A. RULE 60 IS NOT A BAR TO APPELLEE'S APPLICATION.

Rule 60 of the Federal Rules of Civil Procedure is not a bar to the right of the district to have interpreted the modifying order of January 25, 1946.

Before considering the legal effect of Rule 60 we wish to point out the inconsistency of appellants' position.

The proceedings in case No. 10,934 and in Case No. 11,737 originated upon a motion by appellants for a modification of the final decree in the bankruptcy matter.

It is to be borne in mind that the final decree in bankruptcy was entered August 17, 1942 and the motion was made by appellants to modify on September 11, 1944 (R. 38-39, Case No. 10,934); thus the motion was made long after the expiration of the limitation period of six (6) months which now counsel seeks to invoke against appellee.

Again, the order modifying the final decree which is the subject matter of this proceeding, was entered

January 25, 1946, yet appellants did not file their application for leave to sue until October 7, 1946, considerably over six (6) months from the date of the final decree. The original final decree denied them the right to sue, and the order of modification denied them the right to sue for the full amount.

Appellants' application to sue is nothing more than an application to modify the final decree, inasmuch as the first order modifying the final decree did not give appellants the right to sue for the full amount; such application was made considerably after six months from the entry of the modifying order; hence if appellants wish to invoke Rule 60 against appellee, such Rule must, to be consistent, be invoked against appellant. This would leave the parties just where they were prior to the application of appellants to sue, and the application of the district for an interpretation by the court of the modifying order.

However, Rule 60 has not the effect appellants seek to give to it.

In *U. S. v. Klapprott*, 6 F. R. D. 450, decided February 7, 1947, a civil proceeding was instituted by the United States attorney to revoke an order admitting the defendant to citizenship and to cancel the certificate of naturalization issued thereon on the ground of fraud and illegality. The original complaint was filed on May 12, 1942. Summons and complaint were personally served on defendant May 14, 1942. The defendant failed to appear within the time prescribed by the summons, to-wit: Sixty days, and a default

judgment in conformity with the prayer of the complaint was entered on July 16, 1942; on January 7, 1947, five years later, the defendant filed a verified petition in the matter to open, vacate and set aside the default judgment entered. The authority of the court to grant relief was challenged under Rule 60 (B) of the Rules of Civil Procedure, 28 C. P. C. A. In other words, the petition being filed over six months, it was contended that it should be denied upon that ground, and upon the ground there is no discretionary power in the court to change such period of limitation.

The court, however, held that Rule 60 expressly excepts from its application the power of the court

“To entertain an action to relieve a party from a judgment, order or proceeding.”

The court states:

“This exception, liberally interpreted, preserves the historic authority of the court to entertain either a bill of review or a bill in the nature of a bill of review in the proper case.”

In the Klapprott action the court further states that the present “petition,” notwithstanding its form, should be regarded as a bill of review, and further states that “We shall so regard it.” The court, however, denied the petition not on the ground it was barred by Rule 60 but for two other reasons, first, the lack of ground sufficient to sustain it, and second, the unreasonable delay of the defendant in pursuing the remedy. The remedy, as stated above, was not sought until after five years after the judgment was entered.

In the instant case the district is not even seeking a review; all it applied for was to have the court interpret its order. Appellants' motion to sue would require a modification of the decree, and it might be well argued that Rule 60 would apply thereto, however, the district is not seeking a modification of the decree but a clarification of what the court meant.

B. CIRCUIT AND DISTRICT COURTS' INTENTION.

The District Court and the Circuit Court did not intend that the final decree should be modified to the extent as herein contended by appellants. Originally as stated above, Bekins filed an application with the District Court for permission to present their bonds and receive payment of the composition figure. The District Court, Judge Martin I. Welsh, presiding, dismissed the petition; appeal was taken to this court and this court ordered the District Court's order reversed, and the case remanded to the District Court with directions to grant appellants' motion.

Bekins v. Compton-Delevan, 150 F. (2d) 526.

The motion in the above case which this court ordered granted reads as follows (p. 38, Case No. 10,-934):

“Milo W. Bekins and Reed J. Bekins, as trustees appointed by the will of Martin Bekins, deceased, move the court for an order requiring the Compton-Delevan Irrigation District and the depository to pay to movents \$2200.00 upon surrender and deposit of \$11,000 principal amount of bonds

of Compton-Delevan Irrigation District, together with appurtenant unpaid coupons maturing January 2, 1932 and subsequent, being bonds 409, 410, 411, 413, 414, 415 of the original issue, and bonds R136, R137, R138 and R139 of the refunding issue, each of the par value of \$1000 and, if necessary for that purpose, to modify the terms of the final decree and to extend the time thereof for the deposit of said bonds and, if necessary for that purpose, to relieve movents from their default, if any herein, and to grant them the right to appear and claim the payment provided by the Plan of Composition despite the provisions of the final decree. Said motion is made upon the annexed statement, affidavit and (25) authorities."

The motion was solely for the right to present bonds and receive payment; that is all this court ordered and anything more than that was neither contemplated nor ordered.

Judge Welsh originally dismissed appellants' motion; later under the order of this court he entered the modifying order of January 25, 1946 (R. 5-6) having first deleted therefrom the provision which would have granted appellants the right to take proceedings for the collection of said bonds in full, if upon presentation they were not paid within thirty days. *Judge Welsh in the first instance, believed the motion should have been denied; this court ordered the motion to be granted; appellants proposed an order modifying the final decree so that they could present their bonds and receive payment, and included therein a provision that if the bonds were not paid within thirty days after*

presentation, appellants could sue for their bonds in full. Judge Welsh deleted this provision. Thus it is apparent that Judge Welsh did not intend to give to appellants the right, in the event the bonds were not paid within thirty days after presentation, to sue for the amount thereof in full. It was never the intention of this court in the Bekins case, nor of the District Court, that the appellants could sue for the bonds in full; the order as finally signed merely granted the right to appellants to collect the composition figure, without being bound by the terms of the final and interlocutory decrees enjoining them from suing for such composition figure.

C. APPELLANTS ARE ESTOPPED FROM ATTACKING COURT'S ORDER.

Appellants are estopped from invoking Rule 60 and in attacking the final order of the court denying appellants the right to sue.

Appellants in the Bekins case, No. 10,934, made their motion to modify the final decree long after six months after the final decree had become final. The final decree became final August 17, 1943. The Bekins filed their motion to modify the final decree on August 18, 1944, just one year and one day after the final decree became final.

The order modifying the final decree was made January 25, 1946. Appellants filed their application for leave to sue on October 7, 1946, eight months and a

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The order modifying the final decree was made January 25, 1946. Appellants filed their application for leave to sue on October 7, 1946, eight months and a

half after the order had become final. The district filed its application to have interpreted the order modifying the final decree on November 14, 1946.

The application of the district, was not, in and of itself to modify the final decree but merely asked the court to interpret its meaning, which interpretation was necessary in view of appellants' motion for leave to sue. However, appellants' motion would require a modification of the final decree by reason of the fact that in the original order the District Court refused to grant permission to sue for the bonds in full, and struck the clause which would have given such permission, therefrom.

In addition it seems apparent that appellants accepted the final order of the District Court denying appellants' motion for leave to sue and granting the district's application for an interpretation of the modifying order, for in a preliminary order the court ordered that there should be paid to the appellants by the district three hundred eighty-five dollars as and for attorney fees and costs in the present proceedings, which sum was deposited by appellees with the registrar on June 25, 1947. On July 16, 1947, the registrar paid to Milo W. Bekins, one of appellants, the said sum of three hundred eighty-five dollars, which said Milo W. Bekins kept and did not return to the registry until September 30, 1947. (R. 67.)

For the reasons above appellants are estopped from invoking Rule 60, and further estopped by accepting the benefit of the court's order denying leave to sue

and granting the district's application by accepting and retaining from July 16, 1947 to September 30, 1947, the three hundred eighty-five dollars ordered paid by the court to Bekins before the court would enter its final order denying the motion to sue and granting the application for interpretation.

D. EQUITIES.

The evidence in this case consists primarily of affidavits. In drawing affidavits the writer has always found that if, at a later date, they were to be redrawn, they might have been more full than when originally prepared. However, the affidavits as set forth in the record are quite full and complete. The affidavit of Jerome D. Peters (R. 15-25) we believe set forth in full the equities of the district and the reasons why equity required the court to make its order denying appellants' petition and granting the district's application; this affidavit is augmented by a further affidavit of Jerome D. Peters found in the record (R. 26-30). We earnestly call the court's attention to these affidavits, and deem it not necessary to repeat here all that is contained in them.

The district, when the order of January 24, 1947 was made, did not have the money to pay the composition figure. (R. 17, 18.)

Irrigation districts levy assessments each year in September for money required for the ensuing fiscal year. (California Water Code, Sections 25,500-25,656.)

When the Bekins presented their bonds March 25, 1946, the district did not have the funds to pay the same, but immediately sought to borrow the money from the Reconstruction Finance Corporation, which on April 4, 1946 wrote the secretary that the district might make application to borrow the money, and if granted the Reconstruction Finance Corporation would require that judgment be assigned to it and the district would have to agree to make annual levies within specified years, not to exceed four, to repay the Reconstruction Finance Corporation. On May 4, 1946, the district passed a resolution to borrow the money from the Reconstruction Finance Corporation; on May 24, 1946, the Reconstruction Finance Corporation suggested the district request either a new loan or have permission to use the District Bond Reserve fund. The Bond Reserve fund is a fund set aside for the purpose of the agreement between the District and the Reconstruction Finance Corporation whereby the Reconstruction Finance Corporation agreed to advance the money to the District to effect its composition with its creditors, and wherein the district agreed to issue new bonds in the amount of money so advanced, which bonds have been issued and delivered to the Reconstruction Finance Corporation; said agreement also provided that the district should build up a Bond Reserve fund to take care of the new bonds, principal and interest, in the sum of \$4500.00, to be built up at the rate of \$900.00 per annum, until it reached the sum of \$4500.00 and thereafter to be held at such figure until the bonds are paid. On May 24,

1946 there were \$3700.00 in said Bond Reserve fund, but under the agreement of the district with the Reconstruction Finance Corporation this fund could be used for no other purpose than the one specified in the aforesaid agreement. This letter was from the Kansas City office of the Reconstruction Finance Corporation and stated upon receipt of a report from the district indicating it would consent to the conditions outlined, that the Reconstruction Finance Corporation would transmit the matter to its Washington, D. C. headquarters for appropriate action. That at the next meeting of the Board of Directors of the District held July 14, 1946, the entire Board of Directors stated it was resigning, and suggested the matter be left for the determination of the new board; that at the time the board of the district comprised E. E. Saal, James Mills, Jr., and Hugh Baber; upon the 8th day of July 1946 E. E. Saal and James Mills, Jr. resigned leaving only one director, Hugh Baber; that said Compton-Delevan Irrigation District is situated in the County of Colusa, State of California and no land owners reside within the district and under the law the directors are appointed by the Board of Supervisors. Upon August 1, 1946, the Board of Supervisors appointed N. C. Post and Robert M. Smith in the place of the two who had resigned. On August 1, 1946 the Board of Supervisors appointed W. Knowles as a director in place of Robert M. Smith who had not accepted the appointment. That upon October 22, 1946, the said N. C. Post and W. Knowles filed official bonds required by law and took their oaths of office, and the

first meeting of the board since the June 19, 1946 meeting was held November 6, 1946. (R. 20, 21, 22.) That upon November 14, 1946 the district deposited with the Registrar of the District Court the sum of \$2200.00, being the sum due the Bekins; that on July 24, 1946, the Washington, D. C. office of the Reconstruction Finance Corporation communicated with the district, suggesting that the district, through its secretary, inform the Reconstruction Finance Corporation to the effect that the district would consent to the terms and conditions outlined in its said letter of May 24, 1946. On July 24, 1946 there was no Board of Directors of the District, and no one with authority to deal with the Reconstruction Finance Corporation and there was no one in authority until two members were appointed and qualified on October 22, 1946.

The composition figure in the Compton-Delevan Bankruptcy matter was twenty cents upon the dollar. All but a few accepted the composition figure; the Bekins trustees were of those who did not present their bonds. They brought suit to have the final decree amended so they might present their bonds and be paid their money. This suit went through the Courts. The Bekins trustees finally prevailed, this court stating that in equity the composition money to be paid for the bonds was not legally the District's but was equitably the Bekins'; the District Court amended the final decree to conform to the order of this court. To now give the Bekins the right to recover the full value of the bonds would be giving them a preference which would not be in accord with equity; all other bond-

holders who had accepted the settlement figures surely ought to be entitled to the full face value of their bonds if the Bekins are. The fundamental rule in bankruptcy matters is that no creditor be given a preference. The Bekins prevailed on equitable principles, otherwise, if the decision was made on wholly legal principles they would not have prevailed. The Bankruptcy Court is an equitable court, and should consider all the facts and circumstances. The Bekins money is in the hands of the Registrar of the District Court; all they need to do is to present their bonds and accept their money.

This court in pursuance of principles of equity ordered a final decree in bankruptcy to be amended to permit the Bekins to present their bonds and secure the composition money; here the Bekins are not pursuing principles of equity in demanding they be paid at full face value of the bonds and the decision herein should be guided and decided upon the same equitable principles that were involved when the Bekins made their order.

CONCLUSION.

The \$2200.00 to which the Bekins trustees are entitled, is on deposit in the registry of the District Court, and under the order of the court will be delivered to the Bekins trustees upon their presenting for cancellation their bonds.

Also, there is in the registry the \$385.00 ordered by the District Court to be paid to the Bekins for at-

torney fees and costs, which likewise awaits their calling for same.

It is respectfully submitted that the order of the lower court be affirmed, and thus bring to an end this litigation.

Dated, Chico, California,
March 29, 1948.

Respectfully submitted,
PETERS AND PETERS,
Attorneys for Appellee.

No. 11,737

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILO W. BEKINS and REED J. BEKINS
as Trustees under the Last Will of
Martin Bekins, Deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION DIS-
TRICT,

Appellee.

CLOSING BRIEF FOR APPELLANTS.

W. COBURN COOK,
Berg Building, Turlock, California,
Attorney for Appellants.

FILED

APR 13 1948

PAUL F. O'BRIEN,

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PRELIMINARY STATEMENT.

Appellants undertake to answer the brief of appellee and in so doing will follow the general headings set forth in the brief for appellee. There are some matters concerning the facts and evidence which should first be referred to.

There is an unintentional error in the statement made on page 12 of Brief for Appellants where it is stated in effect that the application for leave to sue on the bonds was made to the District Court June 13, 1946, referring to the record as R. 10 and 12. This statement is apparently concurred in by appellee at

page 6 of its brief. However, appellee does make the proper statement at page 11 saying that the motion was filed October 7, 1946. This is the correct date (R. 14). The explanation of this error is that the application is dated June 13, 1946 (R. 12) and although it does not appear in the record, the application had been presented to Judge Goodman, *ex parte*, at about that time, who eventually directed counsel to make a formal application on notice. Hence the application was filed October 7, 1946 (R. 14).

ARGUMENT.

A. RULE 60 IS A BAR TO APPELLEE'S APPLICATION.

Appellee states that the application which they (appellants) had made for leave to sue was nothing more than an application to modify the final decree (page 13, appellee's brief). The application to the Court was merely a matter of proper practice. The final decree had already been amended. The District Court in its order granting the motion to modify the final decree, January 25, 1946 (R. 5, 6) used this language, "or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein."

That language seems to be clear and unambiguous. It sweeps aside everything in the final and interlocutory decrees upon the failure of the district to

put up its money. The application for leave to sue was merely a request for confirmation by the Court that the trustees were no longer bound by the final and interlocutory decrees. It was not an attempt at modification of the decree. Consequently Rule 60 definitely applies.

The case of *U. S. v. Klapprott*, 6 F.R.D. 450 cited by appellee on the same page of its brief is not in point, for that case refers to an independent "action" to relieve a party from a "judgment, order or proceeding." The appellee undertook no such procedure in any of its proceedings. It neither undertook a proceeding in the nature of a bill of review or an independent action.

No explanation is made in appellee's reply as to why an extension of time was not sought by the appellee before the 30 days was up. Rule 6 (b) Federal Rules of Civil Procedure reads:

"Enlargement. When by these rules or by a notice given thereunder or by order of Court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; * * * "

The appellee has not even now claimed that its failure to pay was an oversight in some manner and

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The appellee has not even now claimed that its failure to pay was an oversight in some manner and

therefore "excusable neglect". If it actually did not have the money at the time, it could have requested an extension of time from the court before the 30 days was up. The fact that it did not apply for an extension might imply that it had no just grounds for making application.

Not only did the appellee fail to take advantage of the above quoted rule and apply to the court for an extension, but it also failed to seek an unofficial extension of time from the trustees or their counsel. The appellee's brief fails to give any reason for failure to take this precaution which is normally granted as a courtesy between attorneys. Instead, the appellee failed to deposit any money until after October 7, 1946, when the trustees sought leave to sue.

The appellee in its brief (page 12), attempts to show that the trustees are inconsistent in their position regarding Rule 60. As to the extension of time to present their bonds granted in case number 10,934 (*Bekins v. Compton-Delevan I. D., supra*) that might well come under the exception in rule 6 (b) for excusable neglect. The six months rule would not be applicable in such circumstances. The decision however in that case seems to be founded on the failure to give notice of the entry of the decree. In the present proceedings the trustees are merely seeking the relief that the final order of January 25, 1946, gave them, namely: "upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no

longer be bound by the terms of the final decree or interlocutory decree herein''. In other words, they are seeking leave to sue free, of any restraint, and the Court was asked to determine that the conditions precedent existed.

B. CIRCUIT AND DISTRICT COURTS' INTENTION.

In a sense it does not matter what the Circuit Court intended in reversing the previous case, because there was a right of appeal from the order which followed the mandate, and the order was quite clear that upon failure to deposit the consideration for the composition the trustees would be free of the contract. Let us suppose, while considering this for a moment, that the Compton-Delevan District had failed to make any deposit for any of the creditors. Obviously they would not have been bound by the interlocutory decree, and that is all that the Court did here in ordering that upon failure of the Compton-Delevan District to put up the money the trustees would be freed entirely of the composition agreement.

The district, as we have pointed out before, objected to the very words which the judge left in the order which was entered after the mandate came down, but did nothing about it, neither by appeal nor by motion under Rule 60, nor by application under Rule 6 (b) or otherwise.

The District Court left out of the proposed order that part which appellants had proposed and which is quoted by appellee on page 6 of its brief. (Inci-

dentally the appellee italicizes the words "in full" whereas it is not italicized in the proposed order which is copied from R. 80.) There were reasons why the Court omitted this paragraph or phrase from the order, but there are very cogent conclusions from the fact that he left in the order the language to the effect that the trustees would no longer be bound by the terms of the decree. If the trustees are no longer bound by the terms of the final or interlocutory decrees, there can hardly be any implication that they are not bound by certain *specific* terms, for the order states flatly that they are not to be bound by "the terms" which means *all the terms*. There was no thought in the Court's mind of distinguishing between the composition figure and the figure expressed by the face value of the bonds.

The appellee attempts to construe the order of January 25, 1946, and the Court below has construed it in the order complained of to mean that if the district went in default and did not pay during the thirty day period then the trustees could sue, but only for the *composition figure*. If one looks at the interlocutory and final decrees in case number 10,934, the injunction against suing is one against any and all sums rather than the composition figure.

However, there is nothing to indicate that the Court had the injunction feature solely in mind when it provided that the trustees would be relieved from all the terms of the interlocutory and final decrees. The Court was merely carrying out the provisions of the Municipal Bankruptcy Act itself which contemplates

and provides only for a composition agreement becoming binding upon the creditors *if the district puts up the consideration.*

C. APPELLANTS ARE NOT ESTOPPED FROM ATTACKING COURT'S ORDER.

Appellee states at page 18 of its brief that a modification of the final decree is necessary to gain permission to sue on the bonds. This on the theory that the application had been denied before. It was merely not time for the Court to determine whether permission would be granted, as that could well be left to the future or perhaps the Court had in mind that it wasn't necessary to ask for any permission at all if the events occurred which entitled appellants to be freed of the terms of the decree.

Should the trustee be estopped to proceed in this appeal because the clerk of the Court mailed to them a check for costs which they cashed, and then a few weeks later the trustees returned to the clerk the sum so received?

It would seem that the essential elements of estoppel are lacking and that it would be unfair to refuse to listen to the trustees because of the clerk's action and their temporary receipt of the funds.

31 C. J. Secundum p. 236 reads:

“Equitable estoppel is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and equity, from asserting right which might perhaps have other-

wise existed, either of property, of contract, or of remedy, as against another person who in good faith relied on such conduct, and has been left thereby to change his position for the worse and who on his part acquires some corresponding right either of contract or of remedy; * * *."

"This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

In the present case the clerk of the Court took the initiative in mailing out the cost check. The trustees, it is true, accepted it for a short time, but by returning it they have gained no benefit from so receiving it. There is no showing that the district changed its position in reliance on the action of the trustees. In fact, it is doubtful if the district was aware of the fact that the check was ever cashed until after the money was returned.

This money which was deposited in Court did not draw interest and the district had not suffered by the temporary withdrawal of the funds.

"Therefore, the district cannot rely on estoppel because (1) there was no reliance by the district or (2) change of position for the worse. In addition, the act of the trustees in a sense was not "voluntary" as it was more or less a mechanical act without any intent to accept the offer of the district to pay costs

and the composition figure. The record shows that the money was promptly returned when counsel realized that the district might be misled if it learned of the clerk's action.

In addition, the district could not have had the use of the money during the time when it was withdrawn from Court. In no manner can it be said that the district was prejudiced by this oversight in the trustees receiving the check.

In any event, had the trustees retained the \$375 it is much less than the amount which the trustees will be entitled to receive whether this appeal results in reversal or affirmation of the order appealed from.

D. EQUITIES.

The district failed to answer the trustees' question regarding where the money came from that was eventually deposited in Court. The appellee in its brief spends several pages showing its frustrated efforts to obtain a loan from the Reconstruction Finance Corporation but nowhere does it explain where the money did come from.

Sympathy for the poor district is sought because the board resigned on June 19, 1946. However, that was after the 30 days had expired in which the money was to be put up so the resignation could not be an excuse for the original default.

We find no equities shown by the appellee. For reasons of public policy statutes have provided ways

for the insolvent debtors to be relieved of their legal obligations to their creditors by voluntary proceedings. However, if the statute is not strictly complied with, the debtor may not complain if he finds that he still owes one creditor in full. For example, when the creditor's claim is not included in the schedule of debts, and the creditor is never notified to file a claim. Creditors who are notified and become bound may not complain if some other creditor is not barred because of lack of notice or even the debtor's intentional oversight.

In the present case, the debtor failed originally to give the required notice and the Court allowed the creditor an extension of time in which to present the bonds. In turn the Court said that if the debtor did not make available the funds within a specified time after the bonds were presented then the creditor would not be bound by the interlocutory and final decrees. As a condition precedent to relief, the debtor was to put up the money. Since the condition was not complied with and no extension of time was ever sought or granted before the time had expired, the whole composition proceeding as to the trustees was ineffective. Therefore(the Court below was in error in not granting the trustees leave to sue for the full amount.

The implication on page 22 of appellee's brief is that the Bekins Trustees objected to the settlement. That is not borne out by the facts. One of the trustees having become ill, the business matters were not given the attention. This trustee, Mr. Reed J. Bekins, has

subsequently passed away as a result of his illness. There was no answer or objection made to the plan of composition. There has merely been this attitude of the district to try to deprive these creditors of any money whatsoever, in spite of the fact that the Court ordered them to restore the funds that were illegally sent to the Reconstruction Finance Corporation. We have shown in our opening brief that the district could have obtained this money in many ways, and our statements are not adequately refuted or replied to. We have shown here also that the failure of the district to comply with the composition as to one creditor is not a preference or priority. It is merely a penalty for the district failed to keep its part of the bargain.

The Court's order granting the application of the district for interpretation of the Court's order made as a result of the mandate itself fails to do equity as it merely allowed the \$2200 and attorney's fees without even interest, but our complaint is not on that score alone.

At page 2 of appellee's brief it purports to state a reason why the presentation of appellants' bonds was refused and why it refused to pay the composition figure, stating on this page that the district did not have any of the money to effect the composition, that the balance had remained in the registry of the Court, and by the registrar of the Court was forwarded to the Reconstruction Finance Corporation. It may be pointed out that in the previous appeal, *Bekins v. Compton-Delevan*, 150 Fed. (2d) 526 this Court held

that the money "belongs to appellants, not to appellee." Appellee admits that even on May 24, 1946, there was \$3700 in the Bond Reserve fund (Appellee's Brief, page 21), but contends that under the agreement with the R.F.C. this fund could be used for no other purpose than specified in the agreement. However, since the money which the R.F.C. received from the Registrar belonged to the appellants, there seems to be no legal reason why the money could not have been taken out of the Bond Reserve fund and paid to the trustees upon presentation of their bonds.

CONCLUSION.

Wherefore, we respectfully represent that the order below should be reversed and trustees granted leave to sue.

Dated, Turlock, California,
April 8, 1948.

Respectfully submitted,

W. COBURN COOK,
Attorney for Appellants.

No. 11,737

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILO W. BEKINS and REED J. BEKINS
as Trustees under the Last Will and
Testament of Martin Bekins, De-
ceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION DIS-
TRICT,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

W. COBURN COOK,

Berg Building, Turlock, California,

*Attorney for Appellants
and Petitioners.*

AUG 2 - 1948

PAUL P. O'BRIEN,

CLERK

ary 25, 1946 (R. 5). Further that the bonds were actually surrendered for payment.

ARGUMENT.

The Order Granting Motion to Modify Final Decree (R. 5) is the point of contention in this appeal. This order provided (R. 6): "said trustees may, within thirty (30) days after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, * * * bonds * * *, and upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of \$2200.00 * * *, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein."

The gist of this Court's opinion, as we see it, is contained on page 4 of the printed opinion in the following language:

"As indicated above, appellants presented their bonds to appellee's treasurer within the 30-day period specified in the order of January 25, 1946, and appellee failed to pay appellants the \$2,200 and the \$161.60 mentioned above. Appellants contend that, upon such failure, they were no longer bound by the terms of the final decree and hence should have been permitted to bring suits to enforce payment of their bonds in full. We do not

agree. The order of January 25, 1946, required appellee to pay appellants the \$2,200 and the \$161.60, not upon the mere presentation of their bonds to appellee's treasurer within the specified period, but upon the presentation and surrender of their bonds to appellee's treasurer within the specified period. Appellants' bonds were not surrendered to appellee's treasurer within the specified period or at all. Hence the final provision of the order of January 25, 1946, was inapplicable."

WHAT THE EVIDENCE SHOWS.

The evidence on the motion was contained in affidavits.

The affidavit of Reed J. Bekins (R. 13) states: "that he caused the bonds to be presented to the treasurer on March 25th, 1946, for the purpose of *delivery and surrender* thereof *and cancellation* by the said Treasurer, upon the payment to him of \$2200 together with costs in the amount of \$161.60," We respectfully contend that it is not the custom or procedure ever to surrender any bonds except upon payment. The two acts are simultaneous. The tender of the bonds was definitely made. They were in the words of Bekins "presented for surrender". (Emphasis ours).

This is no more than the Water Code of the State of California requires. Section 24500 reads:

"Upon presentation of any matured bond of the district, the treasurer shall pay it from the bond principal fund."

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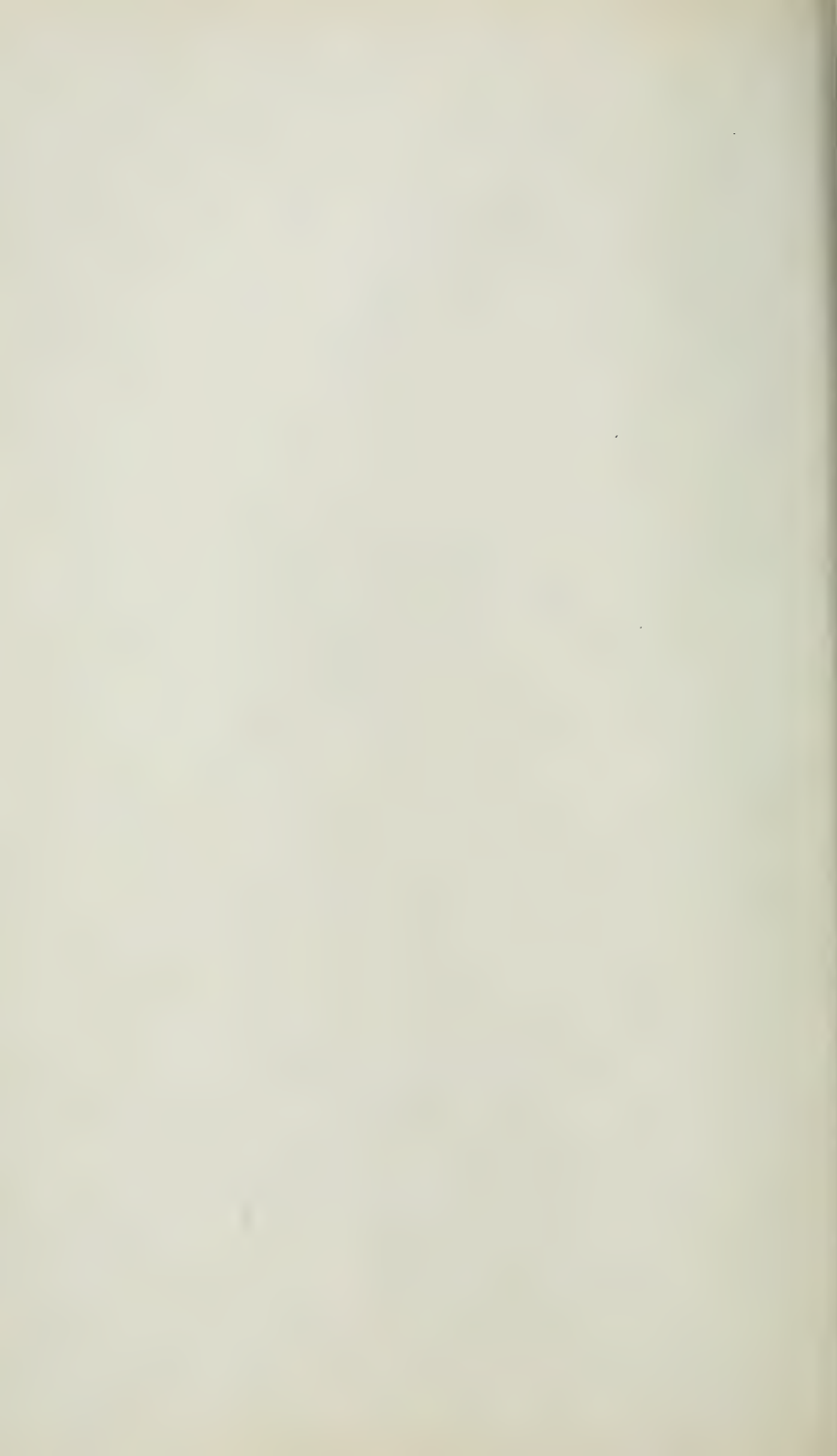
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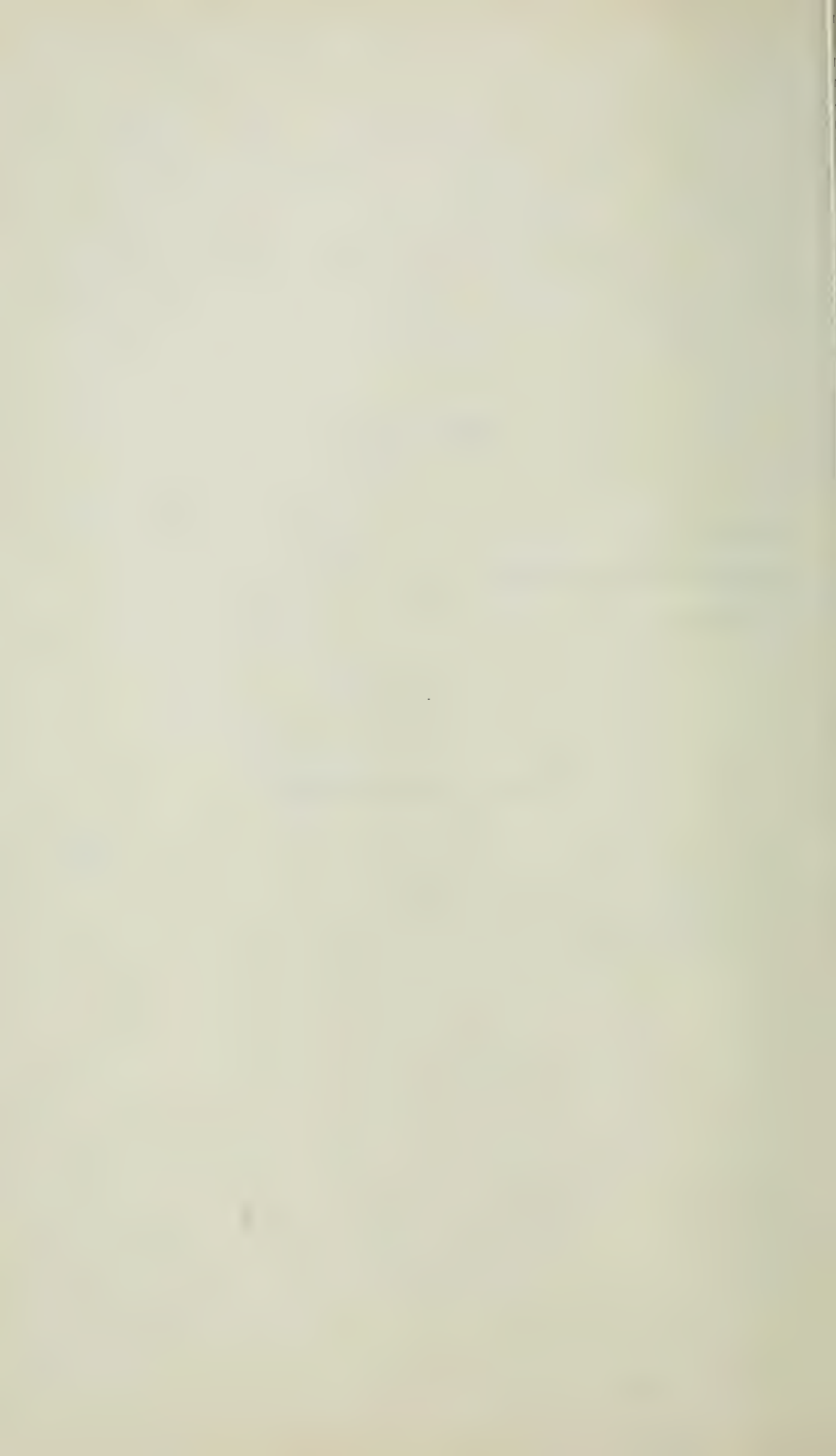


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No. 11,737

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

MILO W. BEKINS and REED J. BEKINS
as Trustees under the Last Will and
Testament of Martin Bekins, De-
ceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION DIS-
TRICT,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable Francis A. Garrecht, Presiding
Judge, and to the Honorable Associate Judges of
the United States Circuit Court of Appeals for
the Ninth Circuit:*

Appellants respectfully petition this Court for a rehearing of this appeal on the following grounds:

It is respectfully submitted that the surrender of the bonds to the Treasurer without payment was not a condition of the Court's order and this Court should correct its decision to hold that the appellants did fully comply with the order of the Court dated Janu-

ary 25, 1946 (R. 5). Further that the bonds were actually surrendered for payment.

ARGUMENT.

The Order Granting Motion to Modify Final Decree (R. 5) is the point of contention in this appeal. This order provided (R. 6): "said trustees may, within thirty (30) days after this order becomes final present to the Treasurer of Compton-Delevan Irrigation District, * * * bonds * * *, and upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of \$2200.00 * * *, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein."

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This is no more than the Water Code of the State of California requires. Section 24500 reads:

"Upon presentation of any matured bond of the district, the treasurer shall pay it from the bond principal fund."

Section 24505 reads:

“A bond presented but not paid shall be stamped
* * *”

Had they been surrendered and cancelled without payment, Bekins could never have under any conditions been relieved from the restraint in the decree prohibiting him from bringing suit on the bonds.

After the effort to surrender the bonds on March 25, 1946, they remained on deposit with the bank in Chico and “were available at any time for payment as provided in said order”. The testimony is uncontradicted (R. 13) that the Treasurer “failed and refused to take and accept delivery and surrender of said bonds”.

In fact, the affidavit of Jerome D. Peters, Counsel for appellee (R. 15, 19) bears this all out. “Thereafter and on or about March 25, 1946, the Bekins bonds were sent to the Chico Branch of the Anglo California National Bank with instructions to present and deliver said bonds upon payment of the sum of \$2200.00 plus \$161.60 costs of suit. That thereafter these were presented to the Secretary-Treasurer of the District by the bank who informed the bank that he did not have sufficient funds on hand to pay same, and on or about March 28, 1946, they were returned to the Bekins.” Thereafter, as Mr. Jerome D. Peters testified, they were again returned to the bank to remain for payment. Mr. Peters testified further (R. 20): “That at the time of the presentation of the bonds in question for payment at the composition

figure, the District did not have sufficient funds to pay.”

That the order modifying the final decree (R. 5) was conditional in that the actual cancellation and surrender of the bonds was only to take place in the event of payment is shown by that part of the order of the Court which says that upon the failure of the district to make such payment upon such presentation and surrender of the bonds, the trustees shall no longer be bound by the terms of the final decree. Appellants respectfully submit that they fully complied with the Court’s order, that the district was in default, and that the Trustees should no longer be held bound by the terms of the final decree.

The customary practice in California in handling the surrender and payment of bonds is to send them to a bank in the city in which the Treasurer’s office is situated, or to send them direct to the Treasurer or to present them at the office of the Treasurer. In any event, the bonds are, as they were here, presented to the Treasurer. To present means in the definition of *The New Century Dictionary* to “hand or send in, as a bill or check for payment; tender”. The act itself implies surrender. The Treasurer takes the bonds into his hands for payment. In this case they were refused payment and the appellee’s counsel says “they were returned to the Bekins” (R. 19). The appellee knew more precisely what happened than appellants. And it seems obvious that the tendered surrender was refused and the bonds returned evidently after being received at the Treasurer’s office.

This is what happens in common practice, and we respectfully submit that this Court's holding of non-surrender and non-compliance with the Court's order is harsh and not in accordance with the occurrence.

We further respectfully submit that if the order of the Court is to stand, interest during the waiting period from March 25, 1946 to date of payment on \$2200 ought to be allowed by the Court.

CONCLUSION.

We submit that the considerations above discussed call for a rehearing of this appeal and for a reversal of the judgment of the Court below.

Dated, Turlock, California,
July 30, 1948.

Respectfully submitted,
W. COBURN COOK,
*Attorney for Appellants
and Petitioners.*

No. 11743

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMPLOYERS' FIRE INSURANCE COMPANY,
THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD and WESTCHESTER FIRE
INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUS-
CONI, as Administrator of the Estate of Tillie
Rusconi, sometimes known as T. Rusconi, Mrs.
Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip
Rusconi, Deceased, FILIPPO RUSCONI, THELMA
RUSCONI SMITH, EILLIEN RUSCONI GOOD-
WIN and CHARLES RUSCONI,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED
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PAUL P. O'NEILL
CLERK

No. 11743
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

EMPLOYERS' FIRE INSURANCE COMPANY,
THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD and WESTCHESTER FIRE
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

LONG & LEVIT

210 West Seventh Street

Los Angeles 14, Calif.

For Appellee United States of America:

JAMES M. CARTER

United States Attorney

RONALD WALKER

CLARKE E. STEPHENS

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif.

For Appellees Charles Rusconi, etc. et al.:

BISHOP & HOFFMANN

THOMAS P. WELDON

215 West Fifth Street

Los Angeles 13, Calif. [1*]

In the District Court of the United States for the
Southern District of California
Central Division

No. 7046-B

CHARLES RUSCONI, as Administrator of the Estate
of Tillie Rusconi, sometimes known as T. Rusconi,
Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs.
Philip Rusconi, Deceased, FILIPPO RUSCONI,
THELMA RUSCONI SMITH, EILLIEN RUS-
CONI GOODWIN and CHARLES RUSCONI,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR MONEY
(for negligence)

With Endorsement of Demand for Trial by Jury

I.

That plaintiff Charles Rusconi at all times herein mentioned, was, ever since has been and still is the regularly appointed, empowered and acting Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, deceased. That plaintiff Filippo Rusconi is the surviving spouse of said Tillie Rusconi, and that plaintiffs Thelma Rusconi Smith, Eillien Rusconi Goodwin and Charles Rusconi are adult children of Tillie Rusconi and plaintiff Filippo Rusconi, and that the plaintiffs Filippo Rusconi, Thelma Rusconi Smith, Eillien Rusconi [2] Goodwin and Charles Rusconi are all the heirs

at law of Tillie Rusconi, deceased, and that each of the plaintiffs is a resident of the County of Santa Barbara, Southern District of California, Central Division. That this action is brought under and pursuant to the "Federal Tort Claims Act."

II.

That on January 30th, 1945, defendant, by and through Elmer R. Steffey, a member of the military forces of the United States, who was then and there an employee of the defendant, to-wit, a 2nd Lieutenant of the United States Army Air Corp then and there stationed at the Santa Maria Army Air Field, and acting in line of duty and within the scope of his office and employment and not engaged in combat activities of said military forces, and then and there on a training maneuver, so negligently and carelessly operated and maintained a certain aircraft, to-wit, a P-38 airplane then and there belonging to the defendant, United States government, so that the same hit, struck and collided with a certain building in Santa Maria, California, commonly known as Rusconi's Cafe, causing the death of said Tillie Rusconi.

III.

That said Tillie Rusconi was of the age of 50 years or thereabouts at the time of her death and had a life expectancy of over 20 years, and that immediately prior to the aforesaid collision she was in good physical and mental health and condition.

IV.

That said Tillie Rusconi was a loving and devoted wife and mother, and that by reason of the negligence of the defendant as aforesaid, plaintiffs have been deprived of

her love, comfort, society, and affection, and in addition, plaintiff Filippo Rusconi has been deprived of her consortium, all to plaintiffs' damage in the sum of \$25,000.00.

V.

That by reason of the negligence of the defendant as aforesaid, and as a proximate result thereof, it was necessary [3] for plaintiffs to incur, and they did incur, burial and funeral expenses on behalf of said Tillie Rusconi in the sum of \$1,362.15 which sum was and is the reasonable value of said burial and funeral expenses.

VI.

That at the time of said collision as aforesaid, said Tillie Rusconi and plaintiff Filippo Rusconi were the owners of and were operating a certain business in the aforesaid building, which said building was the community property of said Tillie Rusconi, now deceased, and plaintiff Filippo Rusconi. That by reason of the negligence of the defendant and as a proximate result thereof, community personal property of said Tillie Rusconi and plaintiff Filippo Rusconi situated in said building, including business fixtures and stock in trade, was damaged or totally destroyed, to the further damage of the Estate of Tillie Rusconi, deceased, and plaintiffs Charles Rusconi as such Administrator and Filippo Rusconi in the further sum of \$33,379.02, and as a further proximate result thereof, said estate and plaintiffs incurred a further cost and expense of salvaging and removing injured, damaged and destroyed personalty from the building following the aforesaid collision, to their further damage in the sum of \$200.67, which is and was the reasonable value of such removal and salvaging.

VII.

That as alleged in Paragraph VI hereof, the deceased, Tillie Rusconi, and plaintiff Filippo Rusconi were operating a certain business which was known as "Rusconi's Cafe," in the aforesaid building, and were in possession thereof under a lease in writing, the term of which would not expire for the next subsequent nineteen calendar months, and were making and receiving a profit from said business of an average of \$2,920.06 per month. That by reason of and as a direct and proximate cause [4] of said negligence of the defendant, said building was totally destroyed, and by reason thereof, said lease became and was terminated, and the Estate of Tillie Rusconi and plaintiffs Filippo Rusconi and Charles Rusconi as such Administrator, were wholly deprived of and lost the profits which would, but for said collision and destruction, have been made and realized during a term of seven months, being the term during which it was impossible to operate said business, to their damage in the further sum of \$20,440.42, and that as a further direct and proximate cause of said negligence of the defendant, and the destruction of said building and the personal property then therein situated, being the fixtures and stock in trade of said business, said plaintiffs lost good will and patronage and the value of the leasehold for the remainder of said term, to their further damage in the sum of \$10,000.00.

VIII.

That at the time of her death said Tillie Rusconi was capable of earning and was then and there earning more than \$1,000 a month; that said earnings were the community property of the deceased and plaintiff Filippo

Rusconi; that at the time of her death, she had a life expectancy of over 20 years; and that by reason of the negligence of defendant and as a direct result of the aforesaid collision and death of said Tillie Rusconi, plaintiff Filippo Rusconi was and is damaged in the further sum of \$30,000.00.

IX.

That plaintiffs have been required to and have engaged the services of Sylvester Hoffmann and Irving G. Bishop, Esqs. (practicing under the firm name of "Bishop & Hoffmann"), each of whom is an attorney at law, admitted to practice before this Court, and of Thomas P. Weldon, of Counsel, a member of the State Bar of California, and have incurred an obligation to [5] pay said attorneys a reasonable fee as and for their services; that plaintiffs are informed and believe and upon such information and belief allege that an aggregate sum equal to twenty per centum (20%) of the amount recovered is and was a reasonable fee for the services rendered and to be rendered by plaintiffs' attorneys in this action.

Wherefore, plaintiffs demand judgment against defendant—

1. In favor of plaintiffs Filippo Rusconi, Thelma Rusconi Smith, Eillien Rusconi Goodwin and Charles Rusconi, in the sum of \$26,362.15;

2. In favor of plaintiffs Charles Rusconi, as Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, deceased, and Filippo Rusconi in the further sum of \$64,020.11;

3. In favor of plaintiff Filippo Rusconi in the further sum of \$30,000.00;

4. In favor of each and all of the plaintiffs for their costs of suit;

5. That the Court fix and determine the reasonable value of the services rendered and to be rendered by Bishop & Hoffmann and Thomas P. Weldon, at twenty percentum (20%) of the amounts recovered by any one or more of the plaintiffs, to be paid therefrom as provided by Section 422 of the aforesaid Act; and

6. For general relief.

BISHOP & HOFFMANN

(and THOMAS P. WELDON, of Counsel)

By Irving G. Bishop

Attorneys for Plaintiffs [6]

DEMAND FOR TRIAL BY JURY

Come now the plaintiffs and demand a trial of this cause before and by a jury.

BISHOP & HOFFMANN

(and THOMAS P. WELDON, of Counsel)

By Irving G. Bishop

Attorneys for Plaintiffs [7]

[Verified.]

[Endorsed]: Filed May 27, 1947. [8]

[Title of District Court and Cause]

SUMMONS

To the Above Named Defendant:

You are hereby summoned and required to serve upon Bishop & Hoffmann, plaintiff's attorneys, whose address is 215 W. 5th Street, Rm. 810, Los Angeles 13, California, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

EDMUND L. SMITH

Clerk of Court

By Charles A. Seitz

Deputy Clerk

Date: May 27, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [9]

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of California—ss:

I hereby certify and return that I served the annexed Summons and Complaint on the therein-named United States of America by ~~handing to and leaving~~ mailing by registered mail a true and

correct copy thereof ~~with~~ to the U. S. Attorney General personally at Washington, D. C. ~~in said District~~ on the 28th day of May, 1947.

ROBERT E. CLARK

U. S. Marshal

By Dwight P. Snyder

Deputy

Marshal's Fees \$4.00. Mileage \$..... Expenses \$.30.
Total \$4.30. [10]

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Southern District of California—ss:

I hereby certify and return that I served the annexed Summons and Complaint on the therein-named United States of America by handing to and leaving a true and correct copy thereof with Gertrude M. Johnson, Clerk, U. S. Attorney's Office, Los Angeles, authorized to accept service for U. S. Attorney personally at Los Angeles in said District on the 28th day of May, 1947.

ROBERT E. CLARK

U. S. Marshal

By Dwight P. Snyder

Deputy [11]

[Endorsed]: Filed Jun. 18, 1947. [12]

[Title of District Court and Cause]

MOTION BY EMPLOYERS' FIRE INSURANCE
COMPANY, THE AUTOMOBILE INSURANCE
COMPANY OF HARTFORD, AND WEST-
CHESTER FIRE INSURANCE COMPANY TO
INTERVENE AS PLAINTIFFS

Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford, and Westchester Fire Insurance Company, move the Court for leave to intervene as plaintiffs in this action and in support of their motion allege and show as follows:

I.

The above entitled cause was commenced in this Court by the filing of complaint on the 27th day of May, 1947. Defendant has been served with process, but has not yet filed its answer.

II.

By their complaint, plaintiffs seek to recover damages [13] against defendant under Public Law 601, Chapter 753 known as the Federal Tort Claims Act. Said damages are alleged to have arisen out of the negligent maintenance and operation of a United States Army airplane by an employee of the defendant on January 30, 1945, as a result of which said airplane crashed into a building at Santa Maria, California, thereby damaging, among other things, certain business fixtures and stock in trade belonging to plaintiff Filippo Rusconi and Tillie Rusconi, deceased (represented in this action by Charles Rusconi, Administrator of her estate).

III.

Prior to the said 30th day of January, 1945, your petitioners had each issued a policy or policies of fire insurance covering said business fixtures or stock in trade to the owners thereof, which said policies of insurance were in full force and effect at the time of said airplane crash, all as more particularly appears from the proposed complaint in intervention of petitioners, the original of which is hereto attached and to which reference is hereby made the same as though herein set forth in full. That, as appears from said proposed complaint in intervention, as a result of the damage to said property caused by said airplane crash, and pursuant to the provisions of said policies, petitioners made the following payments to their respective assureds:

<u>Petitioner</u>	<u>Amount</u>
Employers' Fire Insurance Company	\$2,500.00
Automobile Insurance Company of Hartford	1,600.00
Westchester Fire Insurance Company	5,000.00

By virtue of said payments, petitioners, to the extent of such payments, became subrogated to all rights of their respective assureds against defendant for the damage to said property.

IV.

Petitioners and each of them are entitled to intervene herein under Rule 24(a) because: a) The representation of the [14] interest of each petitioner by plaintiffs is or may be inadequate and each petitioner is or may be bound by a judgment in this action;

b) The complaint herein was filed without the knowledge or consent of petitioners or any of them and it is the desire of petitioners and each of them that they be represented by counsel of their own choosing;

c) In the event of a judgment herein for plaintiffs for less than the value of said property as alleged in the complaint, a dispute may arise between plaintiffs and petitioners as to the distribution of such amount between plaintiffs and petitioners, and such dispute can be avoided if petitioners are permitted to intervene herein.

V.

Petitioners and each of them should be permitted to intervene herein under Rule 24(b) in that their claims and each of them and the main action have questions of law and fact in common as more particularly appears from the proposed complaint in intervention and the complaint herein.

VI.

Petitioners and each of them are entitled to intervene herein under Rules 17, 19, 20 and 21 in that petitioners are real parties in interest herein.

VII.

The granting of this motion will not to any extent delay or prejudice the adjudication of the rights of plaintiffs or defendant.

VIII.

This motion will be made upon all pleadings and papers on file herein and the affidavit of William H. Levit filed herewith.

Wherefore, petitioners and each of them pray that this Court make an order granting them and each of them permission to file the attached complaint in intervention against defendant, and [15] for such other and further relief as to this Court seems just.

Dated: July 11, 1947.

LONG & LEVIT

By William H. Levit

Attorneys for Petitioners

NOTICE OF MOTION

To Sylvester Hoffmann and Irving G. Bishop, Attorneys for Plaintiffs. James M. Carter, Esq., United States Attorney, Attorney for Defendant.

Please take notice that the undersigned will bring the above motion on for hearing before this Court in the courtroom of Honorable Campbell E. Beaumont, United States District Judge, located in the United States Post-office and Court House Building, Los Angeles, California, on the 21st day of July, 1947, at 10:00 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

LONG & LEVIT

By William H. Levit

Attorneys for Petitioners

STATEMENT OF REASONS AND MEMORAN-
DUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO INTERVENE

1. Petitioners having paid a portion of plaintiffs alleged loss thereby became subrogated to plaintiffs' rights against defendant. Having become so subrogated petitioners are certainly proper, and probably necessary, parties to this litigation and should be permitted to intervene therein to properly assert and protect their rights.

Sloan v. Appalachian Electric Power Co., (USDC, W. Va.), 27 Fed. Supp. 108 [16]

Williams v. Powers, (USDC, Ohio), 2 F. R. D. 362

and see also footnote #94, 6 Cyc. of Fed. Proc. (2nd Ed.), p. 137, where it is stated:

“Under present procedure, there seems no reason why in such cases insurer and insured would not both be necessary parties and in position to sue, the one joining the other or showing, in accordance with Rule 19, why they are not joined.”

2. Since the cause of action arose in California, it is pertinent to refer to the following California authorities which hold that the insurer is a proper party to an action to recover from a wrongdoer where it has paid a portion of the loss.

Fairbanks v. S. F. Ry. Co., 115 Cal. 579, 47 P. 450

Offer v. Superior Court, 194 Cal. 114, 228 P. 11

3. That petitioners are real parties in interest under Rule 17(a), see:

Williams v. Powers, *supra*

Fairbanks v. S. F. Ry. Co., *supra*

Offer v. Superior Court, *supra*

Respectfully submitted,

LONG & LEVIT

By William H. Levit

Attorneys for Petitioners

Receipt of copies of the following is hereby acknowledged: Motion of Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford, and Westchester Fire Insurance Company to intervene as plaintiffs. Notice of Motion. Statement of Reasons and memorandum of points and authorities in Support of Motion to Intervene. [17] Complaint in Intervention. Affidavit of William H. Levit. July 11, 1947. Sylvester Hoffmann and Irving G. Bishop; by Irving G. Bishop, Attorneys for Plaintiffs. July 11, 1947. James M. Carter, United States Attorney; by Gertrude M. Johnson, Attorney for Defendant.

[Endorsed]: Filed Jul. 11, 1947. [18]

[Title of District Court and Cause]

AFFIDAVIT OF WILLIAM H. LEVIT IN
SUPPORT OF MOTION TO INTERVENE

State of California

County of Los Angeles—ss

William H. Levit being first duly sworn deposes and says:

That he is a member of the firm of Long & Levit, attorneys for petitioners and makes this affidavit for and on behalf of petitioners in support of their motion to intervene herein.

That the complaint herein was filed without the knowledge or consent of petitioners and it is the desire of petitioners that in the prosecution of their claims against defendant, they be represented by their own counsel, viz., the law firm of Long & Levit.

That the amount claimed in plaintiffs' complaint for damage to their business fixtures and stock in trade, viz., the sum of [19] \$33,379.02, is in excess of the amount agreed upon between plaintiffs and petitioners as the amount of damage to such property in adjusting the loss under the policies of insurance issued by petitioners to plaintiffs, said amount so agreed upon being the sum of \$23,403.11.

That by reason of such difference in alleged values, the interests of petitioners cannot be adequately protected herein unless they are permitted to intervene herein.

WILLIAM H. LEVIT

Subscribed and sworn to before me this 11th day of July, 1947.

(Seal)

RUTH E. SPANGLER

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires June 9, 1950.

[Endorsed]: Filed Jul. 11, 1947. [20]

In the District Court of the United States for the
Southern District of California
Central Division

No. 7046-B

CHARLES RUSCONI, as Administrator of the Estate
of Tillie Rusconi, etc., Deceased, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

EMPLOYERS' FIRE INSURANCE COMPANY, a
corporation, THE AUTOMOBILE INSURANCE
COMPANY OF HARTFORD, a corporation,
WESTCHESTER FIRE INSURANCE COM-
PANY, a corporation,

Plaintiffs in Intervention,

v.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT IN INTERVENTION

Now come plaintiffs in intervention and allege as fol-
lows:

I.

That plaintiff in intervention, Employers' Fire Insurance [21] Company is and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts and authorized to transact the business of fire insurance in and by the State of California; that plaintiff in intervention, The Automobile Insurance Company of Hartford is and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Connecticut and authorized to transact the business of fire insurance in and by the State of California; that plaintiff in intervention Westchester Fire Insurance Company is and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to transact the business of fire insurance in and by the State of California.

II.

That prior to the 30th day of January, 1945, plaintiffs in intervention had issued policies of fire insurance on the California Standard Form to F. Rusconi, Tillie Rusconi and Charles Rusconi, dba Rusconi's Cafe, located at No. 112 South Broadway Street, Santa Maria, California, insuring the property and in the amounts hereinafter set forth and while located at said address:

<u>Company</u>	<u>Policy No.</u>	<u>Insures</u>	<u>Amount</u>
Employers' Fire Insurance Company	400211	Furniture & Fixtures	\$ 500.00
Employers' Fire Ins. Co.	400189	Furniture & Fixtures	2,000.00
The Automobile Ins. Co. of Hartford	419265	Furniture & Fixtures	1,600.00
Westchester Fire Ins. Co.	537489	Merchandise & Stock	5,000.00

that said policies of insurance and each of them were in full force and effect on the 30th day of January, 1945.

III.

That on the 30th day of January, 1945, and in the performance of the acts hereinafter referred to, Second Lieutenant Elmer [22] R. Steffey of the United States Army Air Force was an employee of the defendant stationed at the Santa Maria Air Base, and engaged in the course and scope of his said employment; that at all times herein mentioned defendant was the owner and operator of a certain P-38 airplane assigned to the United States Army Air Force at the Santa Maria Air Base; that on the 30th day of January, 1945 said Second Lieutenant Elmer R. Steffey, and while engaged in the course and scope of his employment by defendant, as aforesaid, was operating the aforementioned airplane in the vicinity of Santa Maria, California; that at the said time and place defendant so negligently and carelessly operated and maintained said airplane that it fell onto and collided with the buildings located at Nos. 112 and 114 South Broadway Street, Santa Maria, California; thereby causing a fire to break out in said buildings; that said crash, collision and fire were proximately caused by the negligence and carelessness of defendant as aforesaid.

IV.

That said fire, so caused by the negligence and carelessness of defendant, as aforesaid, damaged the furniture, fixtures, merchandise and stock insured by plaintiffs

in intervention as aforesaid and which were then and there located in the building at No. 112 South Broadway Street, Santa Maria, California; that as a result of said fire damage, and in accordance with the provisions of said policies of insurance, plaintiffs in intervention paid to their said respective insureds, the following sums:

<u>Company</u>	<u>Policy No.</u>	<u>Amt. Pd.</u>	<u>Date Pd.</u>
Employers, Fire Ins. Co.	400211	\$ 500.00	2/11/46
Employers' Fire Ins. Co.	400189	2,000.00	2/11/46
The Automobile Ins. Co. of Hartford	419265	1,600.00	4/12/45
Westchester Fire Ins. Co.	537489	5,000.00	7/13/45

that the damage to said furniture, fixtures, merchandise and stock, respectively, so caused by said fire, as aforesaid, was not less than [23] the amounts so paid by plaintiffs in intervention under their respective policies.

V.

That by virtue of said payments and as provided in each of said policies, plaintiffs in intervention became subrogated, to the extent of their respective payments, to all of the rights of their assureds against defendant for the damage to said furniture, fixtures, merchandise and stock.

VI.

That on the 20th day of June, 1947, plaintiffs in intervention and each of them, filed claims with the War Department for the damage so caused by defendant as aforesaid; that on the 25th day of June, 1947, plaintiffs in intervention, and each of them, filed with the War Depart-

ment, notice of withdrawal of said claims effective fifteen (15) days from said date.

VII.

That Santa Maria, California, is and was on the 30th day of January, 1945, located in the Southern District of California, Central Division; that this Honorable Court is given original jurisdiction of the claims herein set forth under the provisions of Public Law 601, Chapter 753, known as the Federal Tort Claims Act.

Wherefore, plaintiffs in intervention pray for judgment against defendant as follows:

1. In favor of Employers' Fire Insurance Company in the sum of \$2,500.00.
2. In favor of The Automobile Insurance Company of Hartford in the sum of \$1,600.00.
3. In favor of Westchester Fire Insurance Company in the sum of \$5,000.00.
4. For a reasonable attorneys' fee to be paid out of said recovery to their attorneys.
5. For costs of suit and such other and further relief [24] as may seem proper.

LONG & LEVIT

By William H. Levit

Attorneys for Plaintiffs in Intervention

[Verified.]

[Endorsed]: Lodged Jul. 11, 1947. [25]

In the District Court of the United States
Southern District of California
Central Division
No. 7046-B

CHARLES RUSCONI, as Administrator of the Estate
of Tillie Rusconi, sometimes known as T. Rusconi,
et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

This cause having heretofore come before the court for hearing on motion of Employers' Fire Insurance Company, a corporation, The Automobile Insurance Company of Hartford, a corporation, and Westchester Fire Insurance Company, a corporation, for leave to intervene as parties plaintiff, and the motion having been heard and submitted for decision, and it appearing to the court that the Federal Tort Claims Act [28 U. S. C., §931] does not expressly grant consent to suit by the subrogee of a claimant [cf. 31 U. S. C., §203], and that consent of the Government to be sued, being a relinquishment of sovereign immunity, must be strictly interpreted [United States v. Sherwood, 312 U. S. 584, 590 (1940); Defense Supplies Corporation v. [26] United States Lines Co., 148 F. (2d) 311, 312 (C. C. A. 2nd, 1945)];

It Is Now Ordered that the motion of Employers' Fire Insurance Company, a corporation, The Automomile Insurance Company of Hartford, a corporation, and Westchester Fire Insurance Company, a corporation, for leave

to intervene as parties plaintiff in this action be and is hereby denied.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

Dated: July 28, 1947.

WM. C. MATHES

United States District Judge

Judgment entered Jul. 28, 1947. Docketed Jul. 28, 1947. Book 11, page 63 A Edmund L. Smith, Clerk; By Theodore Hocke, Deputy.

[Endorsed]: Filed Jul. 28, 1947. [27]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford and Westchester Fire Insurance Company hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order denying each of said parties leave to intervene as party plaintiff in this action, entered in this action on July 28, 1947.

LONG & LEVIT

By William H. Levit

Attorneys for Intervenors and Appellants Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford and Westchester Fire Insurance Company

[Endorsed]: Filed & mld. copies to Clarke C. Stephens, atty for deft, & Bishop & Hoffman, attys for plf. Aug. 27, 1947. [28]

ROYAL INDEMNITY COMPANY

Head Office: New York A New York Corporation

[Crest]

A Stock Company

Bond No. S 246537

In the District Court of the United States for the
Southern District of California
Central Division

No. 7046-B

CHARLES RUSCONI, as Administrator of the Estate
of Tillie Rusconi, sometimes known as T. Rusconi,
Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs.
Philip Rusconi, Deceased; FELIPPO RUSCONI,
THELMA RUSCONI SMITH, EILLIEN RUS-
CONI GOODWIN and CHARLES RUSCONI,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that Royal In-
demnity Company, a corporation, organized and existing
under the laws of the State of New York, and duly
licensed to transact business in the State of California,
is held and firmly bound unto Charles Rusconi, as ad-
ministrator of the Estate of Tillie Rusconi, sometimes
known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rus-
coni and Mrs. Philip Rusconi, deceased; Felippo Rusconi,
Thelma Rusconi Smith, Eillien Rusconi Goodwin and

Charles Rusconi, plaintiffs, and United States of America, defendant in the above entitled case, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) dollars, to be paid to said parties, their successors, assigns or legal representatives, for which payment well and truly to be made, the Royal Indemnity Company binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas, Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford, and Westchester Fire Insurance Company, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order of the United States District Court, Southern District of California, Central Division, made and entered on July 28, 1947 denying the motions of said parties to intervene as parties plaintiffs in this action.

Now, Therefore, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the order affirmed, or such costs as the Appellate Court may award if the order is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principals or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render order against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed and Dated this 26th day of August.

The Premium Charged for This Bond Is \$10.00 Per Annum.

ROYAL INDEMNITY COMPANY

By A. A. Christian

Attorney in Fact

State of California,

County of Los Angeles—ss.

On this 26th day of August in the year 1947, before me. L. Hollingshead, a Notary Public in and for the County and State aforesaid, personally appeared A. A. Christian, known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact of Royal Indemnity Company and acknowledged to me that he subscribed the name of said Company thereto as principal, and his own name as Attorney-in-Fact.

L. HOLLINGSHEAD

Notary Public in and for said County and State

My Commission Expires May 14, 1949.

Examined and recommended for approval as provided in Rule 8.

WILLIAM H. LEVIT

Attorney

I hereby approve the foregoing dated this 27 day of Aug., 1947.

EDMUND L. SMITH

Clerk U. S. District Court, Southern District
of California

By Edw. F. Drew

Deputy

[Endorsed]: Filed Aug. 27, 1947. [29]

[Title of District Court and Cause]

APPELLANTS' STATEMENT OF POINTS

Intervenors and appellants will rely upon the following points in the prosecution of their appeal from the order denying leave to intervene herein:

I.

The District Court erred as follows:

1. In denying intervenors' and appellants' motions to intervene as parties plaintiffs.

2. In holding that the Federal Tort Claims Act (28 U. S. C. sec. 931) does not permit suits by subrogees.

3. In holding that 31 U. S. C. sec. 203, which prohibits assignments of claims against the United States, is applicable to subrogated claim.

LONG & LEVIT

By William H. Levit

Attorneys for Intervenors and Appellants Employers'
Fire Ins. Co., The Automobile Ins. Co. of Hart-
ford, Westchester Fire Ins. Company. [30]

[Verified.] [31]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 29, 1947. [32]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 36 inclusive contain full, true and correct copies of Complaint for Money; Summons; Motion by Employers' Fire Insurance Company et al. to Intervene as Plaintiffs; Affidavit of William H. Levit in Support of Motion to Intervene; Complaint in Intervention; Order; Notice of Appeal; Cost Bond on Appeal; Statement of Points and Designation of Record which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$10.25 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 24 day of September, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Endorsed]: No. 11743. United States Circuit Court of Appeals for the Ninth Circuit. Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford and Westchester Fire Insurance Company, Appellants, vs. United States of America, Charles Rusconi, as Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, Deceased, Filippo Rusconi, Thelma Rusconi Smith, Eillien Rusconi Goodwin and Charles Rusconi, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 25, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11743

EMPLOYERS' FIRE INSURANCE COMPANY,
et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Now come the Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford, and Westchester Fire Insurance Company, appellants above named, and for their Statement of Points upon which they intend to rely in this appeal, adopt the Statement of Points filed by them in the United States District Court in connection with their Notice of Appeal and included in the transcript of record prepared and certified by the Clerk of said District Court.

Appellants designate the entire record herein to be printed.

LONG & LEVIT

By William H. Levit

Attorneys for Appellants

[Affidavits of Service by Mail.]

[Endorsed]: Filed Oct. 6, 1947. Paul P. O'Brien,
Clerk.

No. 11744

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NEW YORK UNDERWRITERS INSURANCE
COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH
HART SCOTT and HARRIET ANN SCOTT,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV 2 1917

PALL P. HENDERSON,

CLERK

No. 11744
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

**NEW YORK UNDERWRITERS INSURANCE
COMPANY,**

Appellant,

vs.

**UNITED STATES OF AMERICA, ELIZABETH
HART SCOTT and HARRIET ANN SCOTT,**

Appellees.

TRANSCRIPT OF RECORD

**Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

LONG & LEVIT

210 West Seventh Street

Los Angeles 14, Calif.

For Appellee United States of America:

JAMES M. CARTER

United States Attorney

RONALD WALKER

CLARKE E. STEPHENS

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif.

For Appellees Elizabeth Hart Scott et al.:

BISHOP & HOFFMANN

THOMAS P. WELDON

215 West Fifth Street

Los Angeles 13, Calif. [1*]

In the District Court of the United States for the
Southern Division of California
Central Division
No. 7047-WM

ELIZABETH HART SCOTT and HARRIET ANN
SCOTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR MONEY
(for negligence)

With Endorsement of Demand for Trial by Jury

I.

That plaintiffs are residents of the County of Santa Barbara, Southern District of California, Central Division, and that this action is brought under and pursuant to the "Federal Tort Claims Act."

II.

That on January 30th, 1945, defendant, by and through Elmer R. Steffey, a member of the military forces of the United States, who was then and there in the employ of defendant, to wit, a Second Lieutenant in the United States Army Air Corps, then and there stationed at Santa Maria Army Airfield and acting in line of duty and within the scope of his office and employment, and not engaged in combat activities of said military forces, and then and there on a training maneuver, so negligent- [2] ly and carelessly operated and maintained a certain aircraft, to

wit, a P-38 airplane then and there belonging to the defendant United States Government, so that the same hit and struck certain improvements situated upon the real property owned by plaintiffs each as to an undivided one-half interest, in Santa Maria, California, and that as a direct result and proximate cause of the aforesaid negligence of the defendant the improvements were injured and destroyed, to plaintiffs' damage in the sum of \$17,793.68.

III.

That as a further direct result of and a proximate cause of the aforesaid negligent operation of said aircraft, said improvements were rendered untenable and during the time required to repair and rebuild the same, plaintiffs were deprived of and lost the reasonable rental value thereof and the rents therefrom, to their further damage in the sum of \$2,360.00.

IV.

That plaintiffs have been required to and have engaged the services of Sylvester Hoffman and Irving G. Bishop, Esqs. (practicing under the firm name of Bishop & Hoffmann) each of whom is an attorney at law admitted to practice before this Court, and of Thomas P. Weldon, of Counsel, a member of the State Bar of California, and have incurred an obligation to pay said attorneys a reasonable fee as and for their services; that plaintiffs are informed and believe and upon such information and belief allege that an aggregate sum equal to twenty per-

centum (20%) of the amount recovered is and was a reasonable fee for the services rendered and to be rendered by plaintiffs' attorneys in this action.

Wherefore, plaintiffs demand judgment against the [3] defendant in the sum of \$20,153.68, and for their costs of suit, and pray that the Court fix and determine the reasonableness of their attorneys' fees at twenty per centum (20%) of the amount recovered, exclusive of costs, and order payment of said fees by the defendant out of the amount recovered pursuant to Section 422 of the aforesaid Act; and for general relief.

BISHOP & HOFFMANN
& THOMAS P. WELDON,
of Counsel

By Irving G. Bishop
Attorneys for Plaintiffs

DEMAND FOR TRIAL BY JURY

Come now the plaintiffs and demand a trial of this cause before and by a jury.

BISHOP & HOFFMANN
& THOMAS P. WELDON, of Counsel

By Irving G. Bishop
Attorneys for Plaintiffs [4]

[Verified.]

[Endorsed]: Filed May 27, 1947. [5]

[Title of District Court and Cause]

SUMMONS

To the Above Named Defendant:

You are hereby summoned and required to serve upon Bishop & Hoffmann, plaintiff's attorneys, whose address is 215 W. 5th Street, Los Angeles 13, California, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

EDMUND L. SMITH,

Clerk of Court.

By Charles A. Seitz,

Deputy Clerk.

Date: May 27, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [6]

RETURN ON SERVICE OF WRIT

United States of America,

Southern District of California—ss:

I hereby certify and return that I served the annexed Summons and Complaint on the therein-named United States of America by ~~handing to and leaving~~ mailing by registered mail a true and

correct copy thereof ~~with~~ to the U. S. Attorney General personally at Washington, D. C., ~~in said District~~ on the 28th day of May, 1947.

ROBERT E. CLARK

U. S. Marshal.

By Dwight P. Snyder

Deputy.

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of California—ss:

I hereby certify and return that I served the annexed Summons and Complaint on the therein-named United States of America by handing to and leaving a true and correct copy thereof with Gertrude M. Johnson, Clerk, U. S. Attorney's Office, Los Angeles, authorized to accept service for U. S. Attorney, personally at Los Angeles, California in said District on the 28th day of May, 1947.

ROBERT E. CLARK

U. S. Marshal.

By Dwight P. Snyder

Deputy.

Marshal's Fees \$4.00. Mileage \$. Expenses \$.30.
Total \$4.30.

[Endorsed]: Filed Jun. 18, 1947. [7]

[Title of District Court and Cause]

MOTION BY NEW YORK UNDERWRITERS INSURANCE COMPANY OF NEW YORK TO INTERVENE AS PLAINTIFF

New York Underwriters Insurance Company of New York moves the Court for leave to intervene as a plaintiff in this action and in support of its motion alleges and shows:

I.

The above entitled cause was commenced in this Court by the filing of complaint on the 27th day of May, 1947. Defendant has been served with process, but has not yet filed its answer.

II.

By their complaint, plaintiffs seek to recover damages against defendant under Public Law 601, Chapter 753 known as the Federal Tort Claims Act. Said damages are alleged to have arisen out of the negligent maintenance and operation of a United States [8] Army airplane by an employee of the defendant on January 30, 1945, as a result of which said airplane crashed into a building belonging to plaintiffs located at Santa Maria, California, thereby damaging the same.

III.

Prior to the said 30th day of January, 1945, your petitioner had issued to plaintiffs a policy of fire insurance covering said building and a policy of fire insurance covering loss of rental income from said building, which said policies of insurance were in full force and effect at the time of said airplane crash, all as more particularly ap-

pears from the proposed complaint in intervention of petitioner, the original of which is hereto attached and to which reference is hereby made the same as though herein set forth in full. That, as appears from said proposed complaint in intervention, as a result of the damage to said building caused by said airplane crash, and pursuant to the provisions of said policies, petitioner made the following payment to its said assureds:

<u>Policy No.</u>	<u>Property Insured</u>	<u>Amount</u>
136257	Building	\$9,623.37
134296	Rental Income	1,650.00

By virtue of said payments, petitioner to the extent of such payments, became subrogated to all rights of its assureds against defendant for the damage to said property.

IV.

Petitioner is entitled to intervene herein under Rule 24(a) because:

a) The representation of the interest of petitioner by plaintiffs is or may be inadequate and petitioner is or may be bound by a judgment in this action;

b) The complaint herein was filed without the knowledge or consent of petitioner and it is the desire of petitioner to be represented by counsel of its own choosing; [9]

c) In the event of a judgment herein for plaintiffs for less than the value of said property as alleged in the complaint, a dispute may arise between plaintiffs and petitioner as to the distribution of such amount between plaintiffs and petitioner, and such dispute can be avoided if petitioner is permitted to intervene herein.

V.

Petitioner should be permitted to intervene herein under Rule 24(b) in that its claim and the main action have questions of law and fact in common as more particularly appears from the proposed complaint in intervention and the complaint herein.

VI.

Petitioner is entitled to intervene herein under Rules 17, 19, 20 and 21 in that petitioner is a real party in interest herein.

VII.

The granting of this motion will not to any extent delay or prejudice the adjudication of the rights of plaintiffs or defendant.

VIII.

This motion will be made upon all pleadings and papers on file herein and the affidavit of William H. Levit filed herewith.

Wherefore, petitioner prays that this Court make an order granting it permission to file the attached complaint in intervention against defendant, and for such other and further relief as to this Court seems just.

Dated: July 11, 1947.

LONG & LEVIT

By William H. Levit

Attorneys for Petitioner [10]

NOTICE OF MOTION

To Sylvester Hoffmann and Irving G. Bishop, Attorneys for Plaintiffs; James M. Carter, Esq., United States Attorney, Attorney for Defendant.

Please take notice that the undersigned will bring the above motion on for hearing before this Court in the courtroom of Honorable William C. Mathes, United States District Judge, located in the United States Post-office and Court House Building, Los Angeles, California, on the 21st day of July, 1947, at 10:00 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

LONG & LEVIT

By William H. Levit

Attorneys for Petitioner

STATEMENT OF REASONS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

1. Petitioner having paid a portion of plaintiffs' alleged loss thereby became subrogated to plaintiffs' rights against defendant. Having become so subrogated petitioner is certainly a proper, and probably a necessary, party to this litigation and should be permitted to intervene therein to properly assert and protect its rights.

Sloan v. Appalachian Electric Power Co., (USDC, W. Va.), 27 Fed. Supp. 108

Williams v. Powers (USDC, Ohio), 2 F. R. D. 362 and see also footnote #94, 6 Cyc. of Fed. Proc. (2nd Ed.), p. 137, where it is stated:

"Under present procedure, there seems no reason why in such cases insurer and insured would not both

be necessary parties and in position to sue, the one [11] joining the other or showing, in accordance with Rule 19, why they are not joined.”

2. Since the cause of action arose in California, it is pertinent to refer to the following California authorities which hold that the insurer is a proper party to an action to recover from a wrongdoer where it has paid a portion of the loss.

Fairbanks v. S. F. Ry. Co., 115 Cal. 579, 47 P. 450

Offer v. Superior Court, 194 Cal. 114, 228 P. 11

3. That petitioner is a real party in interest under Rule 17(a), see:

Williams v. Powers, *supra*

Fairbanks v. S. F. Ry. Co., *supra*

Offer v. Superior Court, *supra*

Respectfully submitted,

LONG & LEVIT

By William H. Levit

Attorneys for Petitioner

Receipt of copies of the following is hereby acknowledged: Motion of New York Underwriters Insurance Company of New York to intervene as plaintiff. Notice of Motion. Statement of reasons and memorandum of Points and Authorities in Support of Motion to Intervene. Complaint in Intervention. Affidavit of William H. Levit. July 11, 1947. Sylvester Hoffmann & Irving G. Bishop, by Irving G. Bishop, Attorneys for Plaintiffs. July 11, 1947. James M. Carter, United States Attorney, by Gertrude M. Johnson, Attorney for Defendant.

[Endorsed]: Filed Jul. 11, 1947. [12]

[Title of District Court and Cause]

AFFIDAVIT OF WILLIAM H. LEVIT IN
SUPPORT OF MOTION TO INTERVENE

State of California

County of Los Angeles—ss

William H. Levit being first duly sworn deposes and says:

That he is a member of the firm of Long & Levit, attorneys for petitioner and makes this affidavit for and on behalf of petitioner in support of its motion to intervene herein.

That the complaint herein was filed without the knowledge or consent of petitioner and it is the desire of petitioner that in the prosecution of its claims against defendant, it be represented by its own counsel, viz., the law firm of Long & Levit.

That the amounts claimed in plaintiffs' complaint for damage to their building and for loss of rental income, viz., the [13] sums of \$17,793.68 and \$2,360.00, respectively, are in excess of the amounts agreed upon between plaintiffs and petitioner as the amount of damage to such building and loss of rental income in adjusting the loss under the policies of insurance issued by petitioner to plaintiffs, said amounts so agreed upon being the sum of \$9,627.02 as the damage to said building and the sum of \$1,860.00 for loss of rental income.

That by reason of such difference in alleged values, the interests of petitioner cannot be adequately protected herein unless it is permitted to intervene herein.

WILLIAM H. LEVIT

Subscribed and sworn to before me this 11th day of July, 1947.

RUTH E. SPANGLER

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires June 9, 1950.

[Endorsed]: Filed Jul. 11, 1947. [14]

In the District Court of the United States for the
Southern District of California

Central Division

No. 7047-WM

ELIZABETH HART SCOTT and HARRIET ANN
SCOTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

NEW YORK UNDERWRITERS INSURANCE
COMPANY, a corporation,

Plaintiff in Intervention,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT IN INTERVENTION

Now comes plaintiff in intervention and alleges as follows:

I.

That plaintiff in intervention, New York Underwriters Insurance Company is and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to transact the business of fire insurance in and by the State of California. [15]

II.

That prior to the 30th day of January, 1945, plaintiff in intervention had issued two policies of fire insurance on the California Standard Form to Elizabeth Hart Scott and Harriet Ann Scott, insuring their property and in the amounts hereinafter described:

<u>Policy No.</u>	<u>Property Insured</u>	<u>Amount</u>
136257	Buildings located at Nos. 112-114 South Broadway, Santa Maria, Calif.	\$11,000.00
134296	Loss of rental income on said buildings	3,300.00

that said policies and each of them were in full force and effect on the 30th day of January, 1945.

III.

That on the 30th day of January, 1945, and in the performance of the acts hereinafter referred to, Second Lieutenant Elmer R. Steffey of the United States Army Air Force was an employee of the defendant stationed at the Santa Maria Air Base, and engaged in the course and scope of his said employment; that at all times herein mentioned defendant was the owner and operator of a certain P-38 airplane assigned to the United States Army Air Force at the Santa Maria Air Base; that on the 30th

day of January, 1945, said Second Lieutenant Elmer R. Steffey, and while engaged in the course and scope of his employment by defendant, as aforesaid, was operating the aforementioned airplane in the vicinity of Santa Maria, California; that at the said time and place defendant so negligently and carelessly operated and maintained said airplane that it fell onto and collided with the buildings located at Nos. 112 and 114 South Broadway Street, Santa Maria, California; thereby causing a fire to break out in said buildings; that said crash, collision and fire were proximately caused by the negligence and carelessness of defendant as aforesaid. [16]

IV.

That said fire, so caused by the negligence and carelessness of defendant, as aforesaid, damaged said buildings and made the same untenable thereby causing loss of rental income to plaintiffs; that as a result of said fire damage and loss of rental income, and in accordance with the provisions of said policies of insurance, plaintiff in intervention paid to its said insureds, the following amounts:

<u>Policy No.</u>	<u>Amount Paid</u>	<u>Date of Payment</u>
136257	\$9,623.37	8/7/45
134296	1,650.00	9/6/45

that the damage to said buildings and loss of rental income by plaintiffs, so caused by said fire, was not less than the amounts so paid by plaintiff in intervention under its said policies therefor.

V.

That by virtue of said payments and as provided in each of said policies, plaintiff in intervention became subrogated, to the extent of said payments, to all of the rights of its assureds against defendant for the damage to said buildings and loss of rental income.

VI.

That on the 20th day of June, 1947, plaintiff in intervention filed a claim with the War Department for the damage so caused by defendant as aforesaid; that on the 25th day of June, 1947, plaintiff in intervention filed with the War Department, notice of withdrawal of said claim, effective fifteen (15) days from said date.

VII.

That Santa Maria, California, is and was on the 30th day of January, 1945, located in the Southern District of California, Central Division; that this Honorable Court is given original jurisdiction of the claims herein set forth under the provisions of Public Law 601, Chapter 753, known as the Federal Tort Claims Act. [17]

Wherefore, plaintiff in intervention prays for judgment against defendant in the sum of \$11,273.37, together with costs of suit, a reasonable attorneys' fee out of said recovery for its attorneys and such other relief as to the Court may seem proper.

LONG & LEVIT

By William H. Levit

Attorneys for Plaintiff in Intervention

[Verified.]

[Endorsed]: Lodged Jul. 11, 1947. [18]

In the District Court of the United States
Southern District of California
Central Division

No. 7047-WM

ELIZABETH HART SCOTT and HARRIET ANN
SCOTT,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

This cause having heretofore come before the court for hearing on motion of New York Underwriters Insurance Company of New York, a corporation, for leave to intervene, and the motion having been heard and submitted for decision, and it appearing to the court that the Federal Tort Claims Act [28 U. S. C., §931] does not expressly grant consent to suit by the subrogee of a claimant [cf. 31 U. S. C., §203], and that consent of the Government to be sued, being a relinquishment of sovereign immunity, must be strictly interpreted [United States v. Sherwood, 312 U. S. 584, 590 (1940); Defense Supplies Corporation v. United States Lines Co., 148 F. (2d) 311, 312 (C. C. A. 2nd, 1945)]; [19]

It Is Now Ordered that the motion of New York Underwriters Insurance Company of New York, a corporation, for leave to intervene as party plaintiff in this action be and is hereby denied.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

Dated: July 28, 1947.

WM. C. MATHES

United States District Judge

Judgment entered Jul. 28, 1947. Docketed Jul. 28, 1947. Book 11, page 63 C. Edmund L. Smith, Clerk; by Theodore Hocke, Deputy.

[Endorsed]: Filed Jul. 28, 1947. [20]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS .

Notice Is Hereby Given that New York Underwriters Insurance Company hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying said party leave to intervene as party plaintiff in this action, entered in this action on July 28, 1947.

LONG & LEVIT

By William H. Levit

Attorneys for Intervenor and Appellant New York
Underwriters Insurance Company

[Endorsed]: Filed & mld. copies to attys. for deft. & plf., Clarke E. Stephens & Bishop & Hoffmann Aug. 27, 1947. [21]

ROYAL INDEMNITY COMPANY

Head Office: New York

A New York Corporation

[Crest]

A Stock Company

Bond No. S 246536

In the District Court of the United States for the
Southern District of California
Central Division

No. 7047-WM

ELIZABETH HART SCOTT and HARRIET ANN
SCOTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, That Royal Indemnity Company, a corporation, organized and existing under the laws of the State of New York, and duly licensed to transact business in the State of California, is held and firmly bound unto Elizabeth Hart Scott and Harriet Ann Scott, plaintiffs and United States of America, defendant in the above entitled case, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) dollars, to be paid to said parties, their successors, assigns or legal representatives, for which payment well and truly to be made, the Royal Indemnity Company binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas New York Underwriters Insurance Company of New York is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order of the United States District Court, Southern District of California, Central Division, made and entered on July 28, 1947 denying the motion of said party to intervene as party plaintiff in this action.

Now, Therefore, if the above named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against it if the appeal is dismissed, or the order affirmed, or such costs as the Appellate Court may award if the order is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render order against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed and Dated this 26th day of August, 1947.

The Premium Charged for This Bond Is \$10.00 Per Annum.

ROYAL INDEMNITY COMPANY

By A. A. Christian

Attorney in Fact

State of California,
County of Los Angeles—ss.

On this 26th day of August in the year 1947, before me, L. Hollingshead, a Notary Public in and for the County and State aforesaid, personally appeared A. A. Christian, known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact of Royal Indemnity Company and acknowledged to me that he subscribed the name of the said Company thereto as principal, and his own name as Attorney-in-Fact.

L. HOLLINGSHEAD

Notary Public in and for said County and State

My Commission Expires May 14, 1949.

Examined and recommended for approval as provided in Rule 8.

WILLIAM H. LEVIT

Attorney

I hereby approve the foregoing dated this 21 day of Aug., 1947.

EDMUND L. SMITH

Clerk U. S. District Court, Southern District
of California

By Edw. Drew

Deputy

[Endorsed]: Filed Aug. 27, 1947. [22]

[Title of District Court and Cause]

APPELLANT'S STATEMENT OF POINTS

Intervenor and appellant will rely upon the following points in the prosecution of its appeal from the order denying leave to intervene herein:

I.

The District Court erred as Follows:

1. In denying intervenor's and appellant's motion to intervene as party plaintiff.
2. In holding that the Federal Tort Claims Act (28 U. S. C. sec. 931) does not permit suits by subrogees.
3. In holding that 31 U. S. C. sec. 203, which prohibits assignments of claims against the United States is applicable to subrogated claims.

LONG & LEVIT

By William H. Levit

Attorneys for Intervenor and Appellant New York Underwriters Insurance Company of New York [23]

[Verified.] [24]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 29, 1947. [25]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 29 inclusive contain full, true and correct copies of Complaint for Money; Summons; Motion by New York Underwriters Insurance Company of New York to Intervene as Plaintiff; Affidavit of William H. Levit in Support of Motion to Intervene; Complaint in Intervention; Order; Notice of Appeal; Cost Bond on Appeal; Statement of Points and Designation of Record which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$8.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24 day of September, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Endorsed]: No. 11744. United States Circuit Court of Appeals for the Ninth Circuit. New York Underwriters Insurance Company, Appellant, vs. United States of America, Elizabeth Hart Scott and Harriet Ann Scott, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 25, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11744

NEW YORK UNDERWRITERS INSURANCE
COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Now comes the New York Underwriters Insurance Company, appellant above named, and for its Statement of Points upon which it intends to rely in this appeal adopts the Statement of Points filed by it in the United States District Court in connection with its notice of appeal and included in the transcript of record prepared and certified by the Clerk of said District Court.

Appellant designates the entire record herein to be printed.

LONG & LEVIT

By William H. Levit

Attorneys for Appellant

[Affidavits of Service by Mail.]

[Endorsed]: Filed Oct. 6, 1947. Paul P. O'Brien,
Clerk.

Nos. 11743-11744

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

No. 11743.

EMPLOYERS' FIRE INSURANCE COMPANY, THE AUTOMOBILE
INSURANCE COMPANY OF HARTFORD and WESTCHESTER
FIRE INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUSCONI, as Adminis-
trator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi,
Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, De-
ceased, FILIPPO RUSCONI, THELMA RUSCONI SMITH, EILLIEN
RUSCONI GOODWIN and CHARLES RUSCONI,

Appellees.

No. 11744.

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and
HARRIET ANN SCOTT,

Appellees.

BRIEF OF APPELLANTS.

LONG & LEVIT,
PERCY V. LONG,
BERT W. LEVIT,
WILLIAM H. LEVIT,

210 West Seventh Street, Los Angeles 14,

Attorneys for Appellants.

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Nos. 11743-11744

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

No. 11743.

EMPLOYERS' FIRE INSURANCE COMPANY, THE AUTOMOBILE
INSURANCE COMPANY OF HARTFORD and WESTCHESTER
FIRE INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUSCONI, as Adminis-
trator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi,
Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, De-
ceased, FILIPPO RUSCONI, THELMA RUSCONI SMITH, EILLIEN
RUSCONI GOODWIN and CHARLES RUSCONI,

Appellees.

No. 11744.

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and
HARRIET ANN SCOTT,

Appellees.

BRIEF OF APPELLANTS.

Jurisdiction.

(a) *Of the district court.* This action¹ was filed in the district court by the individual plaintiffs against the appellee, United States of America, under the Federal Tort

¹There are two actions (one by the Rusconis and one by the Scotts) and two appeals involved here and by order of this Court they have been consolidated for hearing on one set of briefs. Since the facts and law involved are practically identical in each case, they will be referred to herein, for convenience sake, in the singular, except in the few instances where it is necessary to point out any differences between the two cases. Except where otherwise indicated, the transcript references will be to the case of *Employers' Fire Insurance Co., et al. v. U. S.* (the Rusconi case), Appeal No. 11743.

Claims Act.² Under Sec. 931 of the Act, exclusive jurisdiction of such actions is vested in the district courts. Appellants filed motions to intervene [Tr. 10-21] under Rule 24(a) (the mandatory section), and 24(b) (the permissive section), and under Rules 17 and 19 (as a real party in interest) of the Federal Rules of Civil Procedure.

The motions were denied by the district court on the sole ground that the Act does not permit the assertion of claims or suits thereunder by subrogees [Tr. 22, 23].

(b) *Of the Circuit Court of Appeals.* Appellants have taken this appeal from the order denying their motions to intervene. Sec. 933 of the Act provides that final judgments in the district court are subject to review by appeal—

“(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts.”

The order of the district court was made and entered on July 28, 1947 [Tr. 23] and the notice of appeal was filed on August 27, 1947 [Tr. 23].

The jurisdiction of this court depends on whether this order is a “final judgment” in so far as appellants are concerned. Because the answer to that question requires an examination into the allegations of the various pleadings, and in order to avoid repetition, we have felt it desirable to postpone discussion of this question of jurisdiction until after the factual situation has been set forth (see Argument, Point I, *infra*).

²Chapter 753, Title IV, Public Law 601, Sec. 401 *et seq.*; 28 U. S. C. A., Sec. 921 *et seq.* (August 2, 1946), hereinafter referred to as “the Act.” Except where otherwise indicated, section references will be to the U. S. Code citation.

Statement of the Case.

According to the complaints, these actions arose out of the crash of a U. S. Army Air Force P-38 airplane, while engaged in training maneuvers, at Santa Maria, California, on January 30, 1945 [Tr. 3]. As a result of the alleged negligence of the Government and the pilot, the plane crashed into a building owned by Elizabeth Hart Scott and Harriet Ann Scott [N. Y. Und. Tr. 3] and in which Tillie Rusconi and her husband Filippo Rusconi were conducting a restaurant business under the name of Rusconi's Cafe [Tr. 3].

As a result of the crash, the building was damaged, Tillie Rusconi was killed, the fixtures and stock in trade of the restaurant were destroyed, and the lease which the Rusconi's held to the premises was thereby terminated [Tr. 3-5].

Tillie Rusconi's administrator, her heirs, and Filippo Rusconi (individually and as an heir) brought this action to recover the following damages:

(a) General damages for the wrongful death of Tillie Rusconi in the sum of \$25,000 [Tr. 3-4].

(b) Funeral expense in the sum of \$1,362.15 [Tr. 4].

(c) Destruction of the fixtures and stock in trade of the restaurant in the sum of \$33,379.02 [Tr. 4].

(d) Loss of profits in the sum of \$20,440.42 [Tr. 5].

(e) Loss of goodwill and value of leasehold in the sum of \$10,000 [Tr. 5].

(f) Loss of Tillie Rusconi's earnings in the sum of \$30,000 [Tr. 5-6].

Likewise, the Scotts brought an action as a result of the damage to the building wherein they sought to recover the following damages:

(a) Damage and destruction of the building in the sum of \$17,793.68 [N. Y. Und. Tr. 3].

(b) Loss of rents while the building was being rebuilt in the sum of \$2,360 [N. Y. Und. Tr. 3].

The original complaints were filed on May 27, 1947 [Tr. 7] and on July 11, 1947, appellants filed their motions to intervene [Tr. 15]. The motions are supported by an affidavit of counsel [Tr. 16], and are accompanied by the proposed complaints in intervention as required by Rule 24(c) [Tr. 17-21].

The motion and supporting pleadings in the Rusconi case set forth that the appellants Employers' Fire Insurance Company, Automobile Insurance Company of Hartford and Westchester Fire Insurance Company are each fire insurance companies doing business in California [Tr. 18]; that prior to January 30, 1945 they had issued, respectively, certain policies of fire insurance covering the fixtures and stock contained in Rusconi's Cafe [Tr. 18]; that as a result of the airplane crash referred to in plaintiffs' complaint and the fire resulting therefrom, appellants paid the following amounts to the Rusconis, their assureds:

Employers Fire Ins. Co.	\$2,500.00
Automobile Ins. Co. of Hartford	1,600.00
Westchester Fire Ins. Co.	5,000.00

that by virtue of such payments, and as provided in the policies, appellants became subrogated, *pro tanto*, to the rights of the Rusconi's against the Government [Tr. 19-20]. It was further alleged that the sum of \$33,-

379.02 claimed in plaintiffs' complaint for damage to the fixtures and stock in trade is in excess of the amount agreed upon between plaintiffs and appellants as the amount of damage to such property in adjusting the loss under the policies, said amount so agreed upon being the sum of \$23,403.11 [Tr. 16]; also that the complaint was filed by the Rusconi's without appellants' knowledge or consent, and that appellants desire that in the prosecution of their claims they be represented by counsel of their own choice [Tr. 16]; that appellants are entitled to intervene under Rule 24(a) because "the representation of the interest of each petitioner by plaintiffs is or may be inadequate and each petitioner is or may be bound by a judgment in this action" [Tr. 12]; and that they should be permitted to intervene under Rule 24(b) because "their claims and each of them and the main action have questions of law and fact in common * * *" [Tr. 12]; and appellants further claim to be real parties in interest and so entitled to intervene under Rules 17 and 19 [Tr. 12].

The petition and supporting pleadings in the Scott case differ only in the following respects: the moving party is appellant New York Underwriters Insurance Company, and the amounts paid by it to the Scotts were the sums of \$9,623.37 for damage to the building and \$1,650.00 for loss of rental income [N. Y. Und. Tr. 15]; that the sums of \$17,793.68 and \$2,360.00 claimed by the Scotts in their complaint for damage to the building and loss of rental income, respectively, are in excess of the amounts agreed upon between the Scotts and appellant as the amount of damage to such building and loss of rental income in adjusting the loss under appellant's policies, said amounts so agreed upon being the sum of \$9,627.02 as the damage to the building and \$1,860.00 for loss of rental income.

In each case the district court denied the motions to intervene on the sole and stated grounds that—

“the Federal Tort Claims Act (28 U. S. C. §931³) does not expressly grant consent to suit by the subrogee of a claimant (cf. 31 U. S. C. §203), and that consent of the government to be sued, being a relinquishment of sovereign immunity, must be strictly construed (cits.)” [Tr. 22-3].

Specification of Errors.

The District Court erred:

1. In denying appellants' motions to intervene as parties plaintiff.
2. In holding that the Act does not permit suits by subrogees.
3. In holding that 31 U. S. C. Sec. 203, which prohibits assignments of claims against the United States is applicable to subrogated claims.

³The pertinent portions of Sec. 931 of the Act provide:

“* * * the United States district court for the district wherein the plaintiff is resident or wherein the act * * * complained of occurred * * * shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * * in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *.”

ARGUMENT.

I. The Order Is Appealable.

A. *The general rule.* In appealing from these orders denying motions to intervene, appellants are cognizant of the rule that where the denial of a petition to intervene is discretionary, it is nonappealable.

In re Dolcater (C. C. A. 2), 106 F. (2d) 30.

But it is equally well settled that there are cases—

“where intervention is so essential to the preservation of the petitioner’s rights that a denial of it is reviewable by appeal. * * * An order denying leave to intervene is * * * appealable in those cases where the petitioner can effectively assert his rights in no other action. The most common examples are where the petitioner will be bound by the judgment and is inadequately represented by other parties before the Court * * *”

In re Dolcater, supra.

And it has been stated that the main and practical difference between absolute (Rule 24(a)) and discretionary (Rule 24(b)) rights of intervention is that in the absolute type, an appeal will lie from an order refusing intervention.

2 Moore’s Fed. Practice 2332, Sec. 24.06.

In the case of *Alston Coal Co. v. Fed. Power Comm.* (C. C. A. 10), 137 F. (2d) 740, the right of appeal is recognized as follows:

“It is a well settled principle of law that where intervention is a matter of right, an order denying the right to intervene is a final appealable order.”

And this Court upheld the right of appeal from an order denying a petition to intervene in the case of *State of Washington v. U. S.* (C. C. A. 9), 87 F. (2d) 421, where it said:

“* * * It sometimes appears that the interveners have no remedy to litigate their question, except by intervening in an existing action or suit. In such cases unless the interveners are permitted to litigate their questions in the pending litigation, their rights, whatever they may be, will be entirely lost, for they have no remedy by which such rights may be protected or adjudicated. An order denying such parties leave to intervene is, as this court stated in its first decision touching the question, a ‘practical denial of all relief to the petitioner’. Therefore such an order is final and appealable.”

See also to the same effect:

U. S. v. Philips (C. C. A. 8), 107 Fed. 824;

Mack v. Passaic Nat. Bank etc. et al. (C. C. A. 3), 150 F. (2d) 474;

Gumbel v. Pitkin, 113 U. S. 545, 28 L. Ed. 1128;

Cathay Trust, Ltd. v. Brooks (C. C. A. 9), 193 Fed. 973.

B. *The order finally disposes of appellants' rights.* The order of the district court by its express terms is a holding that appellants have no right to assert their claims against the Government under the Act. This is no mere procedural ruling or an exercise of discretion in passing on appellants' motions but a final disposition of their right to assert their claims.

C. *If appellants may not litigate their claims in this action, their rights will be entirely lost.* It is well settled in California and generally that the rule against splitting causes of action applies to subrogated claims. In the case of *Kidd v. Hillman*, 14 Cal. App. (2d) 507, 58 P. (2d) 662, it was held that where an insured sued the tortfeasor and settled her claims before judgment, her insurance carrier could not later bring an action on its subrogated claim arising out of the same accident:

“* * * An insured may not split his cause of action, and the insurer is in no better position than the insured. Plaintiff in her original action recovered for injuries to her person and property. She cannot now pursue appellant in another action for damage to her property arising out of the same accident * * *.

It was the duty of the insurer to protect its right of subrogation, assuming it had such right. Not having done so, it cannot now be heard to complain.”

And in the case of *Offer v. Superior Court*, 194 Cal. 114, 228 Pac. 11, the California Supreme Court pointed out that the proper procedure to follow where the loss is only partially covered by insurance is for both insured and insurer to join as parties plaintiff in the same action:

“It may be suggested that to permit the insurer to sue at law in cases where the extent of the loss is not covered by the insurance policy would result in splitting a cause of action sounding in tort and thus subject the defendant to two suits upon a single cause of action. It seems, however, that this may be avoided by joining the insured as a co-plaintiff (cit) or as a

co-defendant if the insured refuses to join as a plaintiff * * *.”

“Since the Act (Sec. 931) subjects the Government to the same liability “to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances” “in accordance with the law of the place where the act * * * occurred”, it seems clear that since California does not permit splitting of actions by subrogees, appellants will have no opportunity to assert their claims other than in this suit.

D. *Intervention is a matter of right under Rule 24 (a)*⁴ *in this case.* It has already been pointed out that appellants will be bound by the judgment in this case. It likewise appears that appellants are not adequately represented by plaintiffs, in that there is a conflict in their interests, since plaintiffs claim a larger amount for the destroyed property than appellants and plaintiffs agreed upon; and because appellants had no choice in the selection of plaintiffs’ counsel and desire to be represented by their own counsel.

2 Moore’s Fed. Practice 2334.

In the case of *Sloan v. Appalachian Electric Power Co.* (U. S. D. C., W. Va.), 27 F. Supp. 108, it was held that an insurer claiming subrogation was entitled to intervene

⁴Rule 24(a) provides in part: “upon timely application anyone shall be permitted to intervene, in an action * * * (2) when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.”

as a matter of right under Rule 24(a) in an action brought against the tortfeasor :

“Rule 24(a) of the Federal Rules of Civil Procedure allows intervention as a matter of right when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action ; under Rule 24(b) permissive intervention is allowed when an applicant’s claim or defense and the main action have a question of law or fact in common.

Under either of these rules this insurance company should be permitted to intervene here. In that manner effect can be given to the Kentucky law which allows the insurance company indemnity it pays out of any judgment which may be rendered for plaintiff. It does not appear that such intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Instead it will permit the just and speedy settlement of the entire controversy in one action.”

E. *Even under Rule 24(b),⁵ the right of appeal should be allowed in this case.* Even if it should be concluded that appellants’ right to intervene falls only under Rule 24(b), since it appears from the district court’s order that the Court refused to exercise its discretion either to grant or deny the motion, but placed its decision solely on a

⁵Rule 24(b) provides in part: “upon timely action anyone may be permitted to intervene in an action * * * (2) when an applicant’s claim or defense and the main action have a question of law or fact in common.”

jurisdictional ground, the right of appeal should be allowed. Then if it be determined that the district court was in error, the matter should be sent back to that court so that it may properly pass on appellants' motion.

F. *Appellants were entitled to intervene under Rule 17.* The case of *Williams v. Powers* (U. S. D. C., Ohio), 2 F. R. D. 362, held that an insurance company which had paid a portion of a plaintiff's claim was entitled to be made a party plaintiff under Rule 17 in an action brought by the insured against the tortfeasor:

"Rule 17 of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c provides in part '(a) Real Party in Interest * * * Every action shall be prosecuted in the name of the real party in interest;' * * *

In a case where an insurance company pays part of the damages sustained by its insured because of the tort of a third party and it claims to be subrogated to the insured's rights to the extent of such payment, both the insured and the insurance company are the real parties in interest in the suit against the party guilty of the tort.

Such being the case here, both motions will be granted and the Employer's Mutual Liability Insurance Company of Wisconsin will become a new party plaintiff in the action."

Since the denial of the motion on this ground is not discretionary, an appeal should lie therefrom.

II. Under the Broad Language Used in the Act, Subrogated Claims Are Included and Petitioners Were Entitled to Intervene.

A. THE PERTINENT PROVISIONS OF THE ACT.

1. *Administrative settlement of claims.* Section 921 of the Act provides for the administrative settlement of claims which do not exceed \$1,000:

“* * * authority is conferred upon the head of each Federal Agency * * * to consider, ascertain, adjust, determine and settle *any claim* against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed \$1,000, caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment, *under circumstances where the United States, if a private person, would be liable* * * *, in accordance with the law of the place where the act * * * occurred.”
(Emphasis added.)

The claimant need not accept the award or decision of the administrative department. Under Sec. 931 of the Act, he may bring suit if he is not satisfied with the administrative decision; however, where the claim is under \$1,000.00 it must first be presented to the department involved as a prerequisite to the filing of suit (Sec. 942).

2. *Suits on tort claims.* Section 931 of the Act provides that suit may be brought against the Government

in the district court on all claims whether for more or less than \$1,000:

“* * * the United States district court for the district wherein the plaintiff is resident or wherein the act * * * complained of occurred * * * shall have exclusive jurisdiction to hear, determine and render judgment *on any claim* against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment, *under circumstances where the United States, if a private person, would be liable to the claimant for such damage* * * * in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of *such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances* * * *” (Emphasis added.)

3. *Claims exempted from Act.* Sec. 943 provides that “the provisions of this chapter shall not apply to * * *” and there follow twelve categories of claims which are exempted from the scope of the Act, none of them being relevant here.

B. THE PLAIN MEANING OF THE ACT.

Looking only at the words used in the Act and considering the question without reference to practical construction, the history of the Act or prior administrative rulings (which will be discussed below), it is submitted that the language used is so broad that it must be deemed to include subrogated claims. The Act confers jurisdiction

on the district court to hear and render judgment "on any claim * * * under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * *"; and further that the Government shall be liable for "such claims, to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *."

As said by the Attorney General (36 Op. Atty. Gen. 553) in ruling that similar language in a prior tort claims statute (31 U. S. C. A. Sec. 215), commonly referred to as the "Small Tort Claims Act"⁶ included subrogation claims:

"Assuming that such a statute is to be strictly construed because in derogation of the immunity of the sovereignty, a strict construction does not permit reading into the statute something that is not there or disregarding its plain terms. The words of the statute include all claims and all claimants."

C. UNDER CALIFORNIA LAW, THE GOVERNMENT WOULD BE LIABLE TO APPELLANTS IF IT WERE A PRIVATE INDIVIDUAL.

The law is well settled in California that upon payment of all or a portion of an insured's loss, which loss resulted from the negligence of a third party, the insurer is thereby subrogated *pro tanto* to the insured's rights against the tortfeasor.

"This right of the insurer against the wrongdoer does not rest upon any relation of contract or of

⁶See Article in 35 Georgetown Law Journal 24, note 69.

privity between them, but arises out of the nature of the contract of insurance as a contract of indemnity. The right arises independent of a provision in the contract of insurance which gives the insurer the right to recover damages from the person responsible for the loss. However, it is plain that the insurer on paying the amount of the loss on the property insured is subrogated only in a corresponding amount to the insured's right of action against any other person responsible for the loss."

Offer v. Superior Court, 194 Cal. 114, 228 Pac. 11.

And the proper procedure in California where the insurer has not paid the whole loss is for both insured and insurer to join together in a single action as co-plaintiffs.

Offer v. Superior Court, *supra*;

Fairbanks v. S. F. Ry. Co., 115 Cal. 579, 47 Pac. 450 (a fire insurance case).

And the procedure in the federal courts in such a situation is the same:

"Under present procedure, there seems no reason why in such cases insurer and insured would not both be necessary parties and in position to sue, the one joining the other or showing, in accordance with Rule 19, why they are not joined."

6 *Cyc. of Fed. Proc.* (2nd Ed.), p. 137, Note No. 94;

Sloan v. Appalachian Electric Power Co., *supra*;

Williams v. Powers, *supra*.

III. The Legislative and Administrative History of the Act Compels the Conclusion That It Includes Subrogated Claims.

A. *Legislative history of the Act.* The doctrine of sovereign immunity in this country was inherited from the law of England where it stemmed from the principle that "The King can do no wrong." Such a doctrine worked considerable hardship on the citizenry, especially as the activities of the Government began to expand and many citizens were or felt themselves to be injured or damaged by acts of the Government. A practice developed of settling and adjusting claims against the Government by legislative action in the form of private acts, such legislation, however, not being a matter of right, but purely a matter of grace on the part of Congress.

However, this procedure proved far from satisfactory and from time to time the Congress waived the immunity of the United States to suit in respect to specified types of claims. On February 24, 1855, the Court of Claims was established (10 Stat. 612) for the chief purpose of entertaining suits on contract against the Government. By act of March 3, 1887 (24 Stat. 505 commonly referred to as the Tucker Act), concurrent jurisdiction with the Court of Claims was conferred on the district courts over contract claims and other claims "not sounding in tort", against the Government as do not involve more than \$10,000. By the act of June 25, 1910 (36 Stat. 851), the Government submitted itself to suit for patent infringement.

The first departure from immunity against suits in tort was made in 1920 by the Suits in Admiralty Act (41 Stat. 525; 46 U. S. C. A. Sec. 742), by which the Gov-

ernment subjected itself to suit in the district courts in respect to admiralty and maritime torts involving merchant vessels owned or operated by the Government. This jurisdiction was later extended to include damages caused by public vessels of the United States (43 Stat. 1112; 46 U. S. C. A. Sec. 781, known as the Public Vessels Act).

Nevertheless, the exemption against suit on common law torts continued. Necessarily, in the course of its activities, countless claims of this nature arose against the Government. In order to afford some relief to the public, heads of executive agencies from time to time were vested by statute with the power to settle and adjust administratively certain types of property damage claims not exceeding a specified amount, usually \$500 or \$1,000. These statutes did not give the claimants any vested rights but merely conferred discretionary authority on the department heads, in some cases to pay the claims out of their appropriations, and in other cases to certify them to Congress for payment. A dissatisfied claimant had no recourse to the courts. And as to tort claims exceeding the amount of the administrative jurisdiction, the claimant's only remedy was to attempt to get a private bill through Congress. The volume of these bills presented to each session of Congress began to assume large proportions; for example in each of the 74th and 75th Congresses over 2300 private claim bills were introduced.⁷

⁷The foregoing summary of the history of sovereign immunity in the United States is taken from the following:

Senate Report No. 1400 to the 79th Congress (2nd Session), pp. 29-31, dealing with the then proposed Act;

Commissioners etc. v. U. S. (U. S. D. C., N. Y.), 72 F. Supp. 549, 552-3.

As appears from Senate Report No. 1400 to the 79th Congress, 2nd Session, pp. 30-31, the Act was proposed to remedy the burdensome and unfair system above described and was intended to include *all* tort claims except those specifically excluded by Sec. 943 (*supra*):

“For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace. Moreover, it does not afford a well-defined continually operating machinery for the consideration of such claims. * * *

* * * As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be maintained against the Government in respect to any common-law tort. The existing exemption in respect to common-law torts appears incongruous. Its only justification seems to be historical. With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles.

In respect to certain classes of small claims the heads of departments are permitted by existing law to make administrative adjustment. However, in no case, is a court review now provided, if the claimant feels aggrieved at the disposition made of his claim by the head of the department. Thus by the act of December 28, 1922 (42 Stat. 1066; U. S. Code, title 31, sec. 215), the head of each department or independent establishment was authorized to adjust *any claim* for property loss or damage caused by the negli-

gence of an officer or employee of the Government acting within the scope of his employment if the amount of the claim does not exceed \$1,000. It will be observed that this authority does not extend to claims for personal injuries or death. There are special statutes in existence permitting the heads of a few departments to adjust claims of a character defined in such statutes, generally not exceeding \$500 in amount. For example, the Postmaster General is vested with power to settle claims not exceeding \$500 involving either personal injuries or property damage caused by operations of the Post Office Department.

The present bill would establish a uniform system authorizing the administrative settlement of small tort claims and permitting suit to be brought *on any tort claim * * * with the exception of certain classes of torts expressly exempted from the operation of the act.*" (Emphasis added.)

As a corollary to the administrative settlement and suit provisions of the Act and in furtherance of the purpose of eliminating the burden on Congress of entertaining private claim bills, Sec. 424(a)⁸ of the Act provides:

"All provisions of law authorizing any Federal agency to consider, ascertain, adjust or determine claims on account of damage to * * * property * * * caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment are hereby repealed in respect of claims cognizable under Part 2 of this title * * *."

and Sec. 131 of the Act⁸ provides that:

"no private bill * * * authorizing or directing (1) the payment of money for property damages

⁸The reference is to Public Law 601 (The Act), as this section has not been codified.

* * * for which suit may be instituted under the
* * * Act, * * * shall be received or considered in either the Senate or the House of Representatives.”

B. For many years subrogated claims have been treated identically with other tort claims by administrative departments and the Congress.

On December 28, 1922, Congress passed what is referred to as the Small Tort Claims Act (42 Stat. 1066; 31 U. S. C. A. Sec. 215). That statute, so far as material, provides:

“The head of each department * * * may consider, ascertain, adjust, and determine *any claim* * * * on account of damages to * * * privately owned property * * * caused by the negligence of any * * * employee of the government acting within the scope of his employment. Such amount as may be found to be due *to any claimant* shall be certified to Congress as a legal claim * * *⁹ (Emphasis added.)

On June 29, 1932, the Attorney General had occasion to consider at length whether this language included subrogated claims (36 Op. Atty. Gen. 553, *supra*). He pointed out that the language used was so broad it must be held to include subrogated claims; that had the Government been a private individual, it would clearly have been liable to respond to the insurer's subrogated claim; and he then stated:

“Bearing these principles in mind, it seems entirely clear that upon payment of the damage by an insurer-

⁹It should be noted that the quoted language is substantially identical with that used in the Act.

ance company, and proof of this fact, you would upon plain principles of law be required to recognize the insurance company as the claimant to whom the amount of the adjusted claim is due, within the meaning of the statute."

He then went on to discuss the legislative history of the 1922 Act stating:

"Nothing in the legislative history of the Act of December 28, 1922, indicates that Congress intended to bar insurance companies from securing relief under the statute. The various committee reports do not discuss any phase of the problem. * * * there is no suggestion that the broad terms of the Act were not intended to grant relief to claimants who under insurance contracts might become subrogated to the rights of the owners."

He then went on to note that the practices of the various executive departments under the 1922 Act were not consistent, the Post Office, Navy and Labor Departments consistently certifying subrogated claims to Congress, and the War, Interior and Agricultural Departments and the Veterans Administration taking a contrary position apparently as the result of a ruling by the Comptroller General (6 Comp. Gen. 770) wherein he construed a prior act (41 Stat. 131) as not including subrogated claims. The Attorney General then pointed out that whenever department heads had certified subrogated claims to it, Congress had uniformly appropriated the money to pay them. He concluded:

"As the ultimate question is the intention of Congress, this practical construction by the legislative body is impressive. Our objective being to ascertain the purpose of Congress in the enactment of this

statute, and since no claim may be paid under the statute until it has been certified to Congress and an appropriation made for that purpose, a ready means is afforded of obtaining a final and conclusive legislative construction. By refusing certification we might obtain ultimately a judicial determination of the question through a mandamus suit brought by some claimant to compel certification of his claim, but that would involve expense and delay, and the sensible course is to have the question cleared up by legislation or by legislative action amounting to a conclusive legislative construction.

For these reasons I believe the practical course is to resolve any doubts by construing the statute to require certification, thus giving the Congress an opportunity to consider and decide whether it intended by this statute that such claims should be paid. In making the certification special attention should be called to the fact that it is a subrogation claim by an insurer and the attention of Congress should be drawn to the point involved so that it may receive deliberate consideration.”

That department heads thereafter uniformly certified subrogated claims to Congress which in turn appropriated moneys to pay them appears from a letter dated, October 6, 1939, from the Federal Works Administrator to the Comptroller General, reproduced in 19 Comp. Gen. 503, 504:

“* * * The Act of December 28, 1922 (42 Stat. 1066; U. S. C. 31, sec. 215), confers authority upon the heads of governmental agencies to consider and determine claims of a similar nature for certification, if favorably determined, to Congress for appropriation for payment. The Attorney General of the United States, on June 29, 1932, rendered an

opinion, vol. 36, page 553, to the effect that subrogation claims of insurance companies could be considered under that act and certified to the Congress in order that it might determine whether the act covered such claims by making appropriations for their payment. *Since that time, it appears that the Congress has consistently appropriated, usually in the deficiency bills, sums to pay for claims of subrogees, thereby evidencing that they are properly for consideration under the act cited.*" (Emphasis added.)

In that letter, the Federal Works Administrator asked the Comptroller General for his opinion as to whether Sec. 26 of the Emergency Relief Appropriation Act of 1939 (53 Stat. 936) included subrogated claims. That act authorized the Administrator to:

"consider, ascertain, adjust, determine and pay
* * * *any claim* * * * on account of damage
to * * * property * * * caused by the negli-
gence of any employee of the * * * National
Youth Administration * * * while acting within
the scope of his employment."

The Comptroller General pointed out the similarity of the quoted statute and the 1922 Small Tort Claims Act passed on by the Attorney General (36 Op. Atty. Gen. 553, *supra*). He refused to follow the earlier contrary opinion of the Comptroller General (6 Comp. Gen. 770, *supra*) and held that the statute in question included subrogated claims, stating:

"* * * There is nothing either in section 26 or in section 20 specifically providing for the payment of subrogation claims, and the legislative history of said section 20 fails to shed any light upon that particular phase of the matter. However, the explana-

tion quoted above with reference to section 20 would appear to indicate that what was intended was the prompt payment of the claims in question under funds appropriated for relief purposes rather than requiring that such claims be reported to the Congress for appropriation under the 1922 act, when the claims are not in excess of \$500.

It is well settled that in the absence of a specific statutory provision the Government is not liable for loss or damages resulting from the negligent acts of its officers and employees. *German Bank v. United States*, 148 U. S. 573, 579. However, the apparent purpose of section 26 of the Emergency Relief Appropriation Act of 1939 and of section 20 in the prior act was, among other things, to partially remove or surrender this immunity from liability so as to permit payment from funds provided by said act of 'any claim' of \$500 or less arising out of the operations thereunder and involving damage to or loss of privately owned property caused by negligence of Work Projects Administration employees while acting within the scope of their employment.

The law is well settled that an insurance company which pays valid claims for loss or damage to privately owned property pursuant to the requirements of an insurance contract with the injured party is entitled to be subrogated to the rights of the insured against the person legally responsible for the loss. (Cit.) *There is nothing in the language of the provision of law here in question nor in the legislative history thereof to indicate an intention that this rule of subrogation should not apply with respect to claims filed under said provision. On the contrary, the use of the broad and comprehensive term 'any claim' would appear to cover all claims of the type described when filed by any person to whom the*

United States would have been liable prior to the enactment of the statute but for its sovereign immunity.

As noted in your letter, the Congress has sanctioned the payment of claims of insurance companies under the act of 1922, and it is to be noted, also, that in at least one instance where the Congress contemplated the exclusion of certain insurance companies from the terms of a relief statute it specifically so provided. See the act of August 27, 1935, 49 Stat. 2194, for the relief of certain claimants who suffered loss by fire in the State of Minnesota during October, 1918, in which it was provided that 'notwithstanding the terms and conditions of any policy of insurance, or the provisions of any law, no fire-insurance company, except farmers' mutual fire-insurance companies, shall have any rights in and to funds appropriated, the payments herein provided for, nor to any right of subrogation whatsoever.' (Emphasis added.)

A similar question was similarly answered by the Comptroller General on October 17, 1941, in a decision furnished the Postmaster General (21 Comp. Gen. 341) wherein he ruled that the Act of June 22, 1934 (48 Stat. 1207; 5 U. S. C. A., Sec. 392), conferring authority on the Postmaster General to settle "*any claim*" for damage to person or property not exceeding \$500 included subrogated claims. He held:

"* * * the use of the broad and comprehensive term '*any claim*' in the act here involved would appear to cover all claims of the class described in the act when filed by any person to whom the United States would have been liable prior to the enactment of the act but for its sovereign immunity." (Emphasis added.)

C. *The enactment of the Act, in light of the foregoing history, indicates an unmistakable intent by Congress to include subrogated claims.*

It is submitted that:

(a) The many years of both administrative and legislative practice in construing the words “*any claim*” and the like in practically identical statutes, to include subrogated claims,

(b) The opinions of the Attorney General and the Comptroller General to the same effect,

(c) The purpose of the Act in eliminating the burden on Congress of dealing with tort claims by private bills, and in giving the right to seek relief in the courts to *all* such claimants,

(d) The failure of the Congressional Committees considering the Act to give any indication that they intended to exclude subrogated claims from the scope thereof, and the failure to so provide in the Act, although certain types of claims were specifically excluded,¹⁰

(e) The lack of any logical reason to exclude subrogated claims from the scope of the Act and thus leave such claimants only the remedy of congressional action, which the Act sought to eliminate, and

(f) The intentional inclusion in the Act of very broad language which was almost identical with the language used in the Small Tort Claims Act and other administrative acts, and which had been for many years construed to include subrogated claims,

¹⁰Section 943 of the Act quoted *supra* under Point II-A-(3).

compel the conclusion that Congress intended to include subrogation claims within the scope of the Act.

It is well settled that administrative and legislative construction of a statute should be given great weight in determining the meaning of a statute—

“Possible doubts as to the proper construction of the language used should be resolved in the light of its administrative and legislative history. * * * The provision has been consistently enforced as construed, was reenacted by Congress in the 1921 Act, and remained on the statute books without amendment until its repeal. Such a construction of a doubtful or ambiguous statute by officials charged with its administration will not be judicially disturbed except for reasons of weight, which this record does not present. (Cits.) The reenactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed.”

McCaugh v. Hershey Chocolate Co., 283 U. S. 488, 492, 75 L. Ed. 1183.

And reenactment by Congress of a statute without material change is deemed to be a legislative approval of previous administrative interpretation—

“The reenactment of the pertinent provisions of sec. 202 of the Revenue Act of 1921 in the Acts of 1924 and 1926, without material change, was a congressional recognition and approval of the interpretation of the section by the treasury regulations which gave them the force of law.”

Hartley v. Comm. of Internal Revenue, 295 U. S. 216, 220, 79 L. Ed. 1399.

and this rule would seem even more appropriate where, as here, the previous interpretation had been shared in by the Congress itself for many years by its action in appropriating money to pay subrogated claims which had been certified to it for payment by administrative departments under similar statutes.

IV. 31 U. S. C. A., Sec. 203 (the Prohibition Against Assignment of Claims Against the United States), Is Inapplicable to Subrogated Claims.

This section provides that—

“All transfers and assignments made of any claim upon the United States * * * shall be absolutely null and void * * *.”

It has uniformly been held that the provisions of this section have no application to an assignment by operation of law.

“The object of this section (31 U. S. C. A., Sec. 203) is to protect the government, and does not embrace cases where there has been a transfer of title by operation of law.”

Western Pac. R. R. Co. v. U. S., 268 U. S. 271, 69 L. Ed. 951.

The claims of appellants arose by operation of law upon payment of the losses, under California law.

“This right of the insurer against the wrongdoer does not rest upon any relation of contract or of privity between them, but arises out of the nature of the contract of insurance as a contract of indemnity. The right arises independent of a provision in the contract of insurance * * *.”

Offer v. Superior Court, supra.

And it was held in the case of *Morgenthau v. Fidelity & Deposit Co.* (Ct. of App., D. C.), 94 F. (2d) 632, 636, that Sec. 203 was inapplicable to a subrogated claim of an insurer since the prohibition does not apply to assignments by operation of law—

“The government contends * * * that the surety has no valid claim on the fund involved because under R. S. §3477, as amended, 31 U. S. C. A. §203, the assignment was void. So far as a legal assignment is concerned much may be said in favor of this contention, but we do not have to pass on this point because R. S. §3477 has never been construed to apply to assignments by operation of law.”

And in the case of *American Tobacco Co. v. U. S.*, 32 Ct. Cl. 207,¹¹ the Court of Claims considered the same question at length and concluded that R. S., Sec. 3477 (31 U. S. C. A., Sec. 203), had no application to subrogated claims against the Government. In that case it appeared that internal revenue stamps of the value of some \$4100 belonging to American Tobacco Co. were destroyed by fire. Certain fire insurance companies paid this sum to the American Tobacco Co. and this suit was then brought against the Government for the use of the insurance companies to recover back the loss so paid. The action was brought under Sec. 3426 of the Revised Statutes which provided that:

“The Commissioner of Internal Revenue may * * * make allowance for or redeem such of the stamps issued under the provisions of this title * * * as may have been spoiled, destroyed or rendered useless

¹¹Affirmed by the Supreme Court in 166 U. S. 468, 41 L. Ed. 1081.

* * *; and such allowance or redemption shall be made either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof * * *.”¹²

The Court of Claims rendered judgment for the claimant (the insurers suing in the name of the insured) and disposed of the non-assignability section as follows:

“* * * The statute which prohibits assignments by the voluntary acts of the parties did not intend by its operation to destroy or limit the equitable doctrine of subrogation, which the common law has recognized and enforced from time immemorial, and which has been most effectual in preserving just rights to parties litigant. It was held in the case of *Erwin v. The United States* (97 U. S. 392) that ‘the act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States,’ which was the subject of consideration in the *Gillis* case, ‘applies only to the voluntary assignment of demands against the Government. It does not embrace cases where there has been a transfer of title by operation of law. * * *’ (P. 223.)

* * * In the passage of the act of 1853, and its subsequent enactment in the Revised Statutes (sec. 3477), Congress did not intend (by the prohibition of the assignment of choses in action pertaining to the Government) to destroy and abrogate the rights of subrogation, which had been recognized by courts of law and courts of equity administering the common law, in connection with the doctrine that upon the grounds of public policy choses in action could not be

¹²Compare the restrictive language here used in specifically referring to the “owner” with the very broad language used in the Act.

assigned so as to change the legal obligations and rights from the assignor to the assignee.

The purpose of the law of 1853 was to confine the obligations of the Government to the party or parties with whom it had contracted, to secure the personal service in the performance of the contract, and more especially to prevent the complications and troubles which might arise in the adjustment of the rights of parties because of the transfer of the contracts and obligations of the Government. No complication or trouble as to these rights can arise out of the subrogation of the rights of the parties.

The obligations and responsibilities of the original parties are to be determined upon the same basis as if no subrogation had intervened." (P. 226.)

V. Under the Analogous Suits in Admiralty Act, Suits by Subrogees Have Been Permitted.

The Suits in Admiralty Act (46 U. S. C. A., Sec. 741 *et seq.*) is a consent by the Government to be sued for maritime torts occasioned by merchant vessels owned or operated by it. Sec. 742 of that Act provides:

"In cases where if such vessel were privately owned or operated, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States * * *."

and by Sec. 743 it is provided:

"Such suits shall proceed and shall be heard and determined according to the principles of law * * * obtaining in like cases between private parties.
* * *

The analogy between that Act and the Federal Tort Claims Act is readily apparent and has been pointed out in the case of *Englehardt v. U. S.* (U. S. D. C., Md.), 69 Fed. Supp. 451, 453.

In the case of *United States Fid. & Guaranty Co. v. U. S.* (U. S. D. C., N. Y.), 56 F. Supp. 452,¹³ the libelant was the compensation insurance carrier for the employer of one Walsh who was injured while working as a longshoreman on a vessel owned and operated by the Government. Walsh applied for and received compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 901, and the carrier then brought this action on behalf of itself and Walsh to recover for Walsh's injuries. The Government excepted to the libel on the ground—

“that the claim of libelant as subrogee or assignee is not one in connection with which the United States has consented to be sued under the Suits in Admiralty Act of 1920 * * *.”

The District Court overruled the exception stating:

“There is no doubt that were this suit between private parties, it could be maintained in admiralty either by the libelant or the employer of Walsh (cits). A libel *in personam* may be brought against the United States in cases where a proceeding in admiralty could be maintained if the vessel were a merchant ship and privately owned. * * * 46 U. S. C. A. § 742, 743. Under the Longshoremen's Compensation Act, 33 U. S. C. A. §901 to 950, the insurance carrier which has assumed payment of the

¹³The same case on a later appeal from a decree in favor of the libelant is reported in 152 F. (2d) 46.

compensation, is subrogated to all of the rights of the employer * * * and the employer has by the same act the right to sue to recover the damages (cit). In my judgment, the recovery here sought is the same which the employee himself might seek, and would be within the jurisdiction asserted. That it is brought in the name of someone else, who, by federal law, is given the right to sue, does not and should not change the jurisdiction status."

Another case where suit by a subrogee was permitted under the Suits in Admiralty Act is *Phoenix Ins. Co. v. U. S.* (U. S. D. C., Conn.), 3 F. Supp. 112. There it appeared that a shipment of iron rods on a vessel owned and operated by the Government was damaged en-route to Japan. In 1926, the consignee brought action in the district court against the U. S. Shipping Board to recover his damages, but the action was dismissed in May 1932, because not commenced within the time prescribed in the Suits in Admiralty Act. In 1932 the Suits in Admiralty Act was amended to extend the period of limitations to December 31, 1932 on any suit "based on a cause of action" whereon a prior suit had been commenced prior to January 6, 1930, and had been dismissed because of limitations. Libelant was the insurance carrier for the consignee and had paid the consignee a loss of \$5,784.41, which it sought to recover in the present action. The Government excepted on the ground that the "cause of action" here sued on was not the same "cause of action" as that of the libel previously brought by the consignee.

The district court overruled the exception stating:

"I can find no merit in the respondent's contention that the 'cause of action' set forth in this libel is not

the same cause of action as that of the libel brought
* * * by the Japanese consignee. * * *

Nor is the identity of that cause of action changed by the subrogation of the insurer, the libelant herein, to the rights of the assured, who was the original libelant. The cause of action in both cases is the combination of the same primary right and its violation. The subrogation results only from a change in the beneficial ownership of the cause of action, and affects the underlying cause not at all (cits.).

If Congress had intended to limit the application of the amendment to the then owners of existing causes of action, it could easily have found language adapted to that purpose. Its failure to do so is significant. Moreover, the intent of Congress to relieve hardship requires the application of the amendment as well to the subrogee as to the libelant. * * *

Another case of interest is *Defense Supplies Corp. v. U. S. Lines Co.* (C. C. A. 2), 148 F. (2d) 311.¹⁴ That was an action brought under the Suits in Admiralty Act by Defense Supplies Corp., a government corporation, on behalf of its insurance carriers which had reimbursed it for damage to a wool shipment alleged to have been caused on a Government vessel. The Government excepted to the libel on the ground that the Defense Supplies Corp. could not maintain a suit against the United States. The district court dismissed the libel and that decision was affirmed on appeal, the circuit court stating:

“* * * The threshold question is whether the Defense Supplies Corporation may bring suit against the United States under the Suits in Admiralty Act.

¹⁴This is one of the two cases cited in the District Court's order. The other will be discussed *infra*, under Point V.

We recognize the fact that the real parties in interest are the insurance companies. But their right to sue is dependent upon the right of the party to whom they are subrogated.

In interpreting the [Suits in Admiralty] act, permitting as it does a suit to be brought against the United States, we must follow the rule of strict construction. This follows from the fact that the United States cannot be sued without their consent, and, if Congress in certain cases gives its consent, the courts are confined to the letter of the statute which express such consent (cit.).

It seems clear to us that the complete ownership of the Defense Supplies Corporation by the United States shows this to be nothing more than an action by the United States against the United States. The Act would appear to contemplate no such action. Sections 1 and 2 indicate that the United States shall be the defendant. And Section 3 states that such suits as are brought under the Act shall proceed according to the principles of law and rules of practice obtaining in like cases between private parties. In private litigation the plaintiff and defendant cannot be the same. For, in that event, there is no real case or controversy. We conclude, therefore, that the Defense Supplies Corporation cannot maintain a suit against the United States under the Suits in Admiralty Act."

It seems implicit from the Court's opinion that had the insured been other than the Government, the action, although on a subrogated claim, would have been sustained, on the ground that such a suit would have been maintainable between private parties. It is submitted that the case is in no wise inconsistent with appellants' position herein, but on the contrary supports it.

VI. The Rule of Strict Construction Is Inapplicable.

The district court based its order on the ground that since the Act does not expressly mention subrogees, it must be construed to exclude them under the rule of strict construction applicable to a statute relinquishing immunity of the sovereign to be sued, citing *United States v. Sherwood*, 312 U. S. 584 and *Defense Supplies Corp. v. U. S. Lines Co.*, 148 F. (2d) 311.¹⁵

The *Sherwood* case dealt with the purely procedural question of whether under the Tucker Act (28 U. S. C. 41 (20)), a suit could be maintained in the district court against the United States and another defendant jointly. The Supreme Court concluded that it could not, citing the rule of strict construction.

In the recent case of *Englehardt v. U. S.* (U. S. D. C., Md.), 69 F. Supp. 451, *supra*, the Court held that under the Act, a joint tortfeasor could be joined as a co-defendant with the Government. The court considered the holding in the *Sherwood* case, *supra*, but concluded that its reasoning and conclusion and the Tucker Act itself, were inapplicable to a construction of the Act. On the contrary, the court felt that the Act was analogous to the Suits in Admiralty Act,—

“* * * I conclude after careful consideration of the *Sherwood* case that its reasoning is not applicable to suits under the recent Federal Tort Claims Act which has a very different history and was intended to apply to quite different situations * * *.

¹⁵The *Defense Supplies Corp.* case has already been discussed under Point V, *supra*.

The jurisdiction conferred in the Federal Tort Claims Act is more similar or analogous to that conferred by the Suits in Admiralty Act (cit.) than the jurisdiction under the Tucker Act. * * *

The language used in the Tort Claims Act as well as the subject matter dealt with, is strikingly similar in effect. Both Acts clearly indicate that it was the intention of Congress to waive its sovereign immunity from suit; and to permit the maintenance in the district court of suits against the United States in cases where there would be liability on individuals in like circumstances * * *.”

And the Supreme Court and this Court have squarely held that the Suits in Admiralty Act and its counterpart the Public Vessels Act are *not* to be construed strictly.

“While the general history of the Act (Public Vessels Act¹⁶) does not establish that the statute necessarily extends to the non-collision cases in view of the rule of strict construction of statutory waiver of sovereign immunity (cits.), we think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation.

* * * we hold that the Public Vessels Act was intended to impose on the United States the same liability * * * as is imposed by the Admiralty law on a private shipowner * * *.”

Canadian Aviator, Ltd. v. U. S., 324 U. S. 215, 222, 228, 89 L. Ed. 901.

¹⁶46 U. S. C. A. 781, *et seq.* Sec. 782 of the Public Vessels Act provides that suits thereunder “shall be subject to and proceed in accordance with the provisions of Chapter 20 (the Suits in Admiralty Act).”

“The Canadian Aviator case considers the Public Vessels Act in the light of the Suits in Admiralty Act and prior pending bills and concludes that it is not to be construed strictly as in other statutes creating the sovereign’s permission to be sued.”

O. F. Nelson & Co. v. U. S. (C. C. A., 9), 149 F. (2d) 692, 699.

It is submitted that considering the history of the Federal Tort Claims Act, the purposes for which it was passed, and the broad language used, it should not be subjected to a stricter rule of construction than the closely analogous Suits in Admiralty Act.

In any event, the rule of strict construction has no application where the language of a statute is clear and unambiguous; and such rule should not be used as a means of emasculating the clearly expressed intention of the Congress.

“Statements appear and reappear in the decisions to the effect that the rules of strict or liberal interpretation have no application where the language of the statute is clear.”

3 *Sutherland Stat. Const.* (3rd Ed.), 40.

“‘Construing a statute strictly means under the authorities simply that it should be confined to such subjects or applications as are obviously within its terms or purposes * * *. In recent years the rule of strict construction has lost much of its force, as it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully its plain and rational meaning, and to promote its object.’”

Lawton v. Sweitzer (Ill.), 188 N. E. 811.

And as was said by the Attorney General (36 Op. Atty. Gen. 553, *supra*), in ruling that the Small Tort Claims Act included subrogation claims:

“Assuming that such a statute is to be strictly construed because in derogation of the immunity of the sovereignty, a strict construction does not permit reading into the statute something that is not there or disregarding its plain terms. The words of the statute include *all claims* and *all claimants*.” (Emphasis added.)

It is respectfully submitted that the orders should be reversed with directions to permit the filing of the complaints in intervention.

Dated: Los Angeles, California, December 16, 1947.

Respectfully submitted,

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Nos. 11743-11744.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMPLOYERS' FIRE INSURANCE COMPANY, THE AUTOMOBILE
INSURANCE COMPANY OF HARTFORD and WESTCHESTER
FIRE INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUSCONI, as Adminis-
trator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi,
Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, De-
ceased, FILIPPO RUSCONI, THELMA RUSCONI SMITH, EILLIEN
RUSCONI GOODWIN and CHARLES RUSCONI,

Appellees.

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and
HARRIET ANN SCOTT,

Appellees.

BRIEF OF APPELLEE.

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trator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi,
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RUSCONI GOODWIN and CHARLES RUSCONI,

Appellees.

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and
HARRIET ANN SCOTT,

Appellees.

BRIEF OF APPELLEE.

Jurisdiction.

(a) This action was filed in the District Court by the individual plaintiffs against the appellee, United States of America, under the Federal Tort Claims Act (28 U. S. C. A. 921). Under Section 931 of the Act, exclusive jurisdiction of said actions is vested in the District Courts. Appellants filed motions to intervene [Tr. 10-21] under Rule 24(a) (the mandatory section), and 24(b) (the

permissive section), and under Rules 17 and 19 (as a real party in interest) of the Federal Rules of Civil Procedure.

The motions were denied by the District Court on the grounds that the Federal Tort Claims Act does not expressly grant consent to suit by a subrogee of a claimant, and that consent of the Government to be sued, being a relinquishment of sovereign immunity, must be strictly interpreted [Tr. 22, 23.]

(b) Of the Circuit Court of Appeals.

The order of the District Court, denying appellants the right to intervene, is a final order so far as appellants are concerned and this Court has jurisdiction over the within matter under Title 28 U. S. C. A. Section 225.

Statement of the Case.

The facts of the case as set forth in Appellants' Brief (pp. 3 to 6) appear to be accurate and are herewith adopted.

Issues.

Appellee contends as follows:

(1) That the District Court did not err in denying appellants' motions to intervene as parties plaintiff;

(2) That the District Court did not err in holding that the Federal Tort Claims Act does not permit suits by subrogees; and

(3) That the District Court did not err in holding that 31 U. S. C., Section 203, which prohibits assignments of claims against the United States is applicable to subrogated claims.

ARGUMENT.

I.

The Order Is Appealable.

A. Appellee agrees that the order of the District Court denying appellants the right to intervene is a final order and this Court has jurisdiction over the within matters under Title 28 U. S. C. A., Section 225.

B. Appellee agrees that the order of the District Court disposes of appellants' rights and that by its express terms is holding that appellants have no right to assert their claims against the Government under the Federal Tort Claims Act.

C. Appellee does not agree that if appellants may not litigate their claims in this action, their rights will be entirely lost.

D. Intervention is not a matter of right under Rule 24(a) or 24(b), Federal Rules of Civil Procedure.

E. Appellee agrees that appellants should have the right to appeal in this case.

F. Appellants are not entitled to intervene under Rule 17 of the Rules of Civil Procedure, 28 U. S. C. A.

II.

Under the Language Used in the Act, Subrogated Claims Are Not Included and Petitioners Were Not Entitled to Intervene.

A. The Pertinent Provisions of the Act.

1. ADMINISTRATIVE SETTLEMENT OF CLAIMS. Section 921 of the Act provides for administrative settlement of claims which do not exceed \$1,000.00. The Act confers authority upon the head of each Federal Agency to consider, ascertain, adjust, determine and settle any claim against the United States, for money only * * * where the total amount of the claim does not exceed \$1,000.00.

Such authority, so granted to the head of each Federal Agency, merely tends to clarify an already existing authority. Section 921 grants such authority to "the head of *each Federal Agency* (emphasis ours) where prior to the passage of the Act some heads of Federal Agencies had such authority while others did not.

2. SUITS ON TORT CLAIMS. Section 931 of the Act provides that suit may be brought against the Government in the District Court on all claims whether for more or less than \$1,000.00.

"* * * the United States District Court for the district wherein the plaintiff is resident or wherein the act * * * complained of occurred * * * shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * em-

ployment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * * in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *.”

3. CLAIM EXEMPTED FROM THE ACT. Section 943 provides that the provisions of the Act shall not apply to twelve categories of claims. These exceptions are not relevant here.

Procedural matters relating to the Federal Tort Claims Act—including intervention—are governed by Federal and not by State law.

Intervention may not be had under Rule 24(a):

Clause (1) is inapplicable, the appellants’ rights to intervene not being unconditionally fixed by statute (and appellants make no claim to any statutory right); and

Clause (2) is also inapplicable, since the appellants’ rights do not accrue until plaintiffs recover.

Martin v. Natl. Surety Co., 300 U. S. 588, 57 S. Ct. 531;

Tolliver v. Cudahy, 39 Fed. Supp. 337;

46 C. J. S. “Insurance,” Sec. 1215, page 187, n. 24, and page 190, n. 71, 72 and 73.

Clause (3) is inapplicable since there is no property in the custody of the Court.

That the appellants may have a right to intervene *after* the main suit is tried and decided in favor of plaintiffs

(*cf. Oliver v. U. S.*, 156 F. (2d) 281) is obviously not now before the Court.

Intervention may not be had under Rule 24(b):

Clause (1) is inapplicable, as no Federal statute confers any right to intervene;

Clause (2) is inapplicable, since the entire "claim" is that of the plaintiffs, although as to the sums paid by the appellants, plaintiffs would hold any proceeds from the suit as trustees for the appellants *after* receiving such proceeds.

46 C. J. S. 187, Sec. 1215, n. 24;

46 C. J. S. 190, Sec. 1215, n. 71, 72, 73.

There is nothing "in common" between the claim of plaintiffs against the Government and the claim appellants seek to set up. The entire cause of action for damages against the Government rests in the plaintiffs; it is settled law that the appellants could have no separate action unless, perhaps, they paid the full loss (which it is admitted they did not) or the plaintiffs settled their claim for damages and released the appellees (which has not happened); the only right of action which the appellants will ever have—and one which they do not have now—is to require plaintiffs to pay them at least a proportionate part of what the plaintiffs actually receive as a result of this action, which question of law or fact is not one concerning the appellee or "common" to plaintiffs' claim.

It is respectfully urged that to grant the right to intervene under Rule 24(b)—and appellants can claim no mandatory right under Rule 24(a)—will interject unneces-

sary issues (such as the applicability of Sec. 203, Title 31 U. S. C. A.), which may become the sole issue of an appeal by the appellee, greatly delaying receipt of payment by both the plaintiffs and the appellants under any judgment herein rendered in favor of the plaintiffs.

Rule 17 of the Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), provides in part:

“(a) Real Party in Interest * * * Every action shall be prosecuted in the name of the real party in interest;” * * *

The Federal Tort Claims Act contemplates suit by the person injured by the negligent act of the Government and refers to the liability of the Government *to the claimant*, which clearly restricts the phrase “any claim” relied on by the appellants, and negatives the right of the fire insurance companies to become plaintiffs at this time by intervention.

Title 28 U. S. C. A., Sec. 931.

The Tort Claims Act does not permit actions on assigned claims—whether by formal assignment or an equitable assignment. Section 411 of the Act (28 U. S. C. A. 932) expressly makes applicable Section 41(20) of Title 28 U. S. C. A.

28 U. S. C. A. 932;

United States v. Crain (1945), 151 F. (2d) 606; 46 C. J. S. 188, Sec. 1215, n. 44 (where claim is unassignable, as here, insurer not proper party plaintiff).

B. The Plain Meaning of the Act.

The Act consents to tort suits against the United States by conferring jurisdiction upon the District Courts to hear, determine and render judgment on *any claim against the United States*, for money only, *on account of damage to*, or loss of property *or on account of* personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.

It appears that the language of the Act confines the grant of jurisdiction to those cases only, which sound in tort, and where money damages are sought by a plaintiff for damage or loss to *his* property or for personal injuries or death.

The Act contemplates suit by the person injured by the negligent act of the Government and refers to the liability of the Government *to the claimant*, which clearly restricts the phrase "any claim" relied upon by the appellants, and negatives the right of the fire insurance companies to become plaintiffs at this time by intervention.

There is no language in the Act that gives consent to suit by a subrogee or assignee, nor is there any language in the Act extending the District Courts' jurisdiction to hear, determine and render judgment against the United States in all kinds of controversies that may be presented in a suit based upon rights derived from the person *who originally* suffered loss and to whom Congress granted the basic right to file suit.

It seems clear that if Congress intended to subject the United States to such litigation it would have said so in language that could not have been misunderstood. The most that can be said for appellants is that they have a

claim for reimbursement against plaintiffs if, as and when plaintiffs recover and are paid, and appellants therefore are not necessary or real parties in interest in the main action.

The Act is one which relaxes sovereign immunity from suit and the well established rule is that statutory language which relaxes this sovereign immunity is strictly construed.

Klamath Indians v. United States, 296 U. S. 244, 250;

Schillinger v. United States, 155 U. S. 163, 166.

C. Under California Law, the Government Would Not Be Liable to Appellants If It Were a Private Individual.

Procedural matters relating to the Federal Tort Claims Act including intervention are governed by Federal and not State law.

III.

The Legislative and Administrative History of the Act Does Not Compel the Conclusion That It Includes Subrogated Claims.

A. Appellants have, in great detail, set forth the administrative history of the Federal Tort Claims Act and have compared it with the Act of March 3, 1887 (10 Stat. 612) commonly referred to as the Tucker Act; with the Admiralty Act (41 Stat. 525; 46 U. S. C. A., Sec. 742); and with the Public Vessels Act (43 Stat. 1112; 46 U. S. C. A., Sec. 781).

Appellants have cited from opinions of the Attorney General of the United States, from the Small Tort Claims Act 42 Stat. 1066; 31 U. S. C. A., Sec. 215, and the Public Vessels Act. From these citations and comparisons

appellants conclude that Congress intended, under the Federal Tort Claims Act, to permit suits by subrogees and assignees.

Appellee submits that it is more reasonable to conclude that when the Federal Tort Claims Act was being considered by the Congress, it had before it all of the history and background cited by appellants, and in all probability, much more. Appellee submits that it can more reasonably be concluded, that with a full history and background before it, had Congress intended to subject the United States to litigation by persons, firms or corporations, not directly involved by the tort committed, it would have said so in language that could not have been misunderstood by adding the words "subrogee," "subrogation," and/or "assignment."

It is the position of the appellee that appellants do not have a substantial right or any interest whatsoever in the subject of the within actions. As indicated above, appellee contends that the Federal Tort Claims Act does not authorize the maintenance of a suit upon a derivative claim, and further, that the Assignment of Claims Act (31 U. S. C., Section 203) forbids the institution of proceedings by a subrogee or assignee.

Appellants' proposed complaint in intervention is based, without question, upon a derivative claim. Appellant seeks to assert the right it acquired by contract with its assured. No matter how appellants seek to dress up their language, the fact still remains that appellants' rights under their agreement with their assured are secondary and not primary. Whatever rights appellants obtained and secured under their agreement were rights that can only be described as subrogation, and/or assignment.

The Federal Tort Claims Act consents to certain tort suits against the United States by conferring jurisdiction upon district courts to hear, determine and render judgment on any claim against the United States, for money only, "*on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government.*"

Appellee contends that the aforementioned quoted language of the Act should receive a restrictive interpretation so as to mean "directly or solely on account of."

The said language confines the grant of jurisdiction to those cases only which sound in tort and where money damages are sought by a plaintiff for damage or loss to *his* property or for personal injuries or death. There is no language in the Act that gives consent to suit by a subrogee or assignee, nor is there any language in the Act extending the courts' jurisdiction to hear, determine and render judgment against the United States in all kinds of controversies that may be presented in a suit based upon *rights derived from the person who originally suffered the loss and to whom Congress granted the basic right to file suit.* (Emphasis ours.)

It is further submitted that the Federal Tort Claims Act does not make the United States vicariously liable to *any* person and that the claims of appellants are based upon a theory of liability independent of that established by Section 410(a) of the Federal Tort Claims Act.

Appellants make much of the following language of Section 931, 28 U. S. C. A.

"Federal District Court has jurisdiction to render judgment on claim where the United States, if a

private person, would be liable to claimant in accordance with the law of the place where the act or omission occurred.”

Appellee contends that the aforementioned language should apply only in instances where the Court has jurisdiction over the subject matter and parties. The matter of jurisdiction over the subject matter or the parties is jurisdictional. It is well settled that United States District Courts are courts of *limited* jurisdiction and that no presumption of jurisdiction attaches to such courts. Jurisdiction cannot be conferred upon the Court by consent of the parties where no such jurisdiction has been conferred by Congress. It has been held that the Federal Rules of Civil Procedure do not enlarge the substantive rights against the Government (*United States v. Sherwood*, 312 U. S. 584).

The right to be sued is a substantive right and if there is no right to be sued under the Federal Tort Claims Act, or if the United States of America has not consented to be sued upon a derivative claim, then the question becomes one as to the jurisdiction of the Court to hear and determine the matter. Relinquishment of sovereign immunity from suit must be based upon consent.

United States v. Shaw, 309 U. S. 495 (1940);

Keifer v. R. F. C., 306 U. S. 381 (1939);

Minnesota v. United States, 305 U. S. 382 (1939);

Kansas v. United States, 204 U. S. 331 (1907);

United States v. Lee, 106 U. S. 196 (1882);

United States v. Thompson, 98 U. S. 486 (1878).

Such relinquishment must be strictly interpreted.

United States v. Shaw, 309 U. S. 495 (1940);
United States v. U. S. Fidelity Co., 309 U. S. 506
(1940);
United States v. Michel, 282 U. S. 656 (1931);
Price v. United States, 174 U. S. 373 (1899);
Schillinger v. United States, 155 U. S. 163 (1894).

Any statutory language which relaxes sovereign immunity from suit must be strictly construed.

Klamath Indians v. United States, 296 U. S. 244,
250;
Schillinger v. United States, 155 U. S. 163, 166.

In *Klamath Indians v. United States*, *supra*, the Court said at page 250:

“* * * the Act grants a special privilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms.”

The appellants' proposed action is based on the theory of subrogation. The appellants themselves have no direct claim or right against appellee independent of their relationship with their assured. It is submitted that there is no distinction between a subrogee or assignee, and the rights of a subrogee are no greater than those of an assignee insofar as the Federal Assignment of Claims Act is concerned (31 U. S. C. Sec. 203; *Offer v. Superior Court*, 194 Cal. 114, 228 Pac. 11).

Appellants' cited authorities do not support their position.

Offer v. Superior Court, 194 Cal. 114, 228 Pac. 11, and *Fairbanks v. S. F. Ry.*, 115 Cal. 579, 47 Pac. 450, contain *dicta* which, if a correct statement of the law in California, are inapplicable for the reasons set forth above.

U. S. F. & G. Co. etc. v. U. S., 56 Fed. Supp. 452, involved a claim under the Longshoremen's Compensation Act (33 U. S. C. A. 901 *et seq.*), which by Section 933(i) thereof expressly provides for subrogation, and provides for assignment by Section 933(c). Consequently Title 31 U. S. C. A., Section 203, was not mentioned or involved. Finally, Congress gave express consent that the United States may be sued (46 U. S. C. A. 742, 743). Furthermore, the Federal Rules do not apply to Admiralty. In Admiralty, incidentally, or in a suit in equity, the subrogee may sue in its own name (*Phoenix v. Erie*, 117 U. S. 321), but the instant case is one at law.

Englehardt v. U. S., 69 Fed. Supp. 451, involved the joinder of two joint tort-feasors as defendants, the Government insisting upon such joinder.

Sloan v. Appalachian Elec. Co., 27 Fed. Supp. 108, was an action between private parties under a state law (Workmen's Compensation Act) expressly providing for subrogation and falling clearly within Clause (1) of both Rule 24(a) and 24(b).

Williams v. Powers, 2 F. R. D. 361, was also an action between private parties, and both the defendant and the insurer moved to make the insurer a party-plaintiff as a real party in interest under state laws which had such effect as regards a contract of indemnity. As shown above, a different rule is generally applicable to *fire* insurance.

Morgenthau v. Fidelity & Dep. Co., 94 F. (2d) 632, holding Section 203, Title 31 U. S. C., inapplicable where

surety under contractor's bond in favor of the Government paid laborers and materialmen *and* claim and voucher therefor were approved—circumstances not present at this time.

It is therefore respectfully submitted that the orders of the District Court should be sustained and appellants not be permitted to file their complaints in intervention.

Dated: Los Angeles, California, January 14, 1948.

Respectfully submitted,

JAMES M. CARTER,

United States Attorney,

RONALD WALKER,

Assistant United States Attorney,

REUBEN ROSENSWEIG,

Assistant United States Attorney,

Attorneys for Appellee, United States of America.

We concur in and adopt this brief filed on behalf of appellee, United States of America, as the brief of appellees Charles Rusconi, *et al.*, and Elizabeth Hart Scott and Harriet Ann Scott.

IRVING G. BISHOP,

SYLVESTER HOFFMAN,

THOMAS P. WELDON.

Nos. 11743-11744.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11743.

EMPLOYERS' FIRE INSURANCE COMPANY, THE AUTOMOBILE
INSURANCE COMPANY OF HARTFORD and WESTCHESTER
FIRE INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUSCONI, as Adminis-
trator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi,
Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, Deceased,
FILIPPO RUSCONI, THELMA RUSCONI SMITH, EILLIEN RUS-
CONI GOODWIN and CHARLES RUSCONI,

Appellees.

No. 11744.

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and
HARRIET ANN SCOTT,

Appellees.

APPELLANTS' REPLY BRIEF.

LONG & LEVIT,

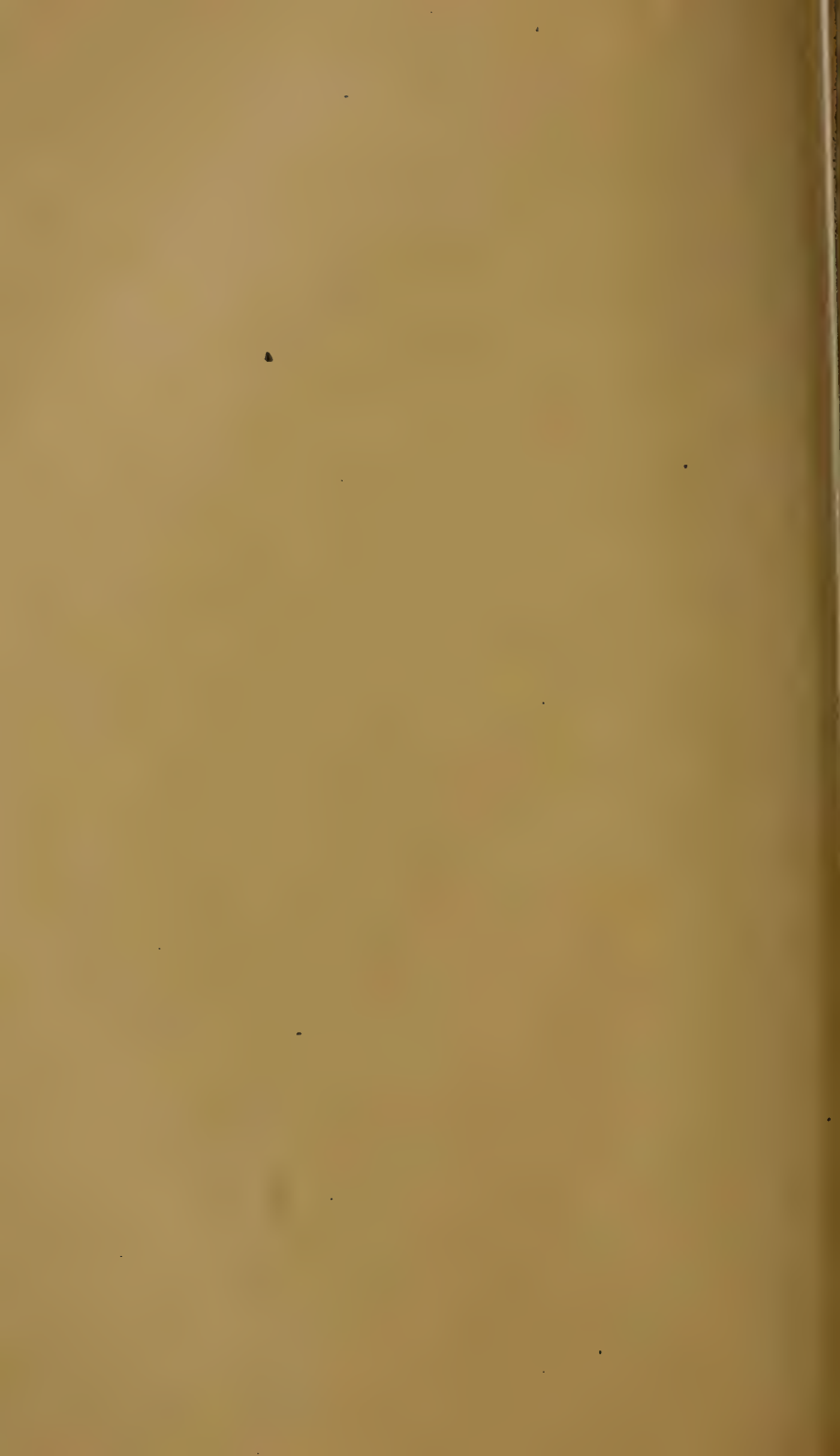
PERCY V. LONG,

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WILLIAM H. LEVIT,

210 West Seventh Street, Los Angeles 14,

Attorneys for Appellants.



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tried" (p. 5); that if and when plaintiffs make a recovery, they will hold the same as trustees for appellants (p. 6); that while these propositions may not be applicable to other forms of insurance, they are applicable to fire insurance (p. 14).

The only authorities cited by appellee in support of these assertions are from jurisdictions other than California. We therefore refrain from discussing them as Section 931 of the Act unmistakably provides that the government shall be liable "under circumstances where the United States, if a private person, would be liable to the claimant for such damages * * * *in accordance with the law of the place where the act or omission occurred.* * * * The United States shall be liable in respect of such claims to the same claimants, in the same manner and to the same extent as a private individual under like circumstances."

Clearer language could not be used to have expressed the unmistakable intent that if, under *California* law, a private tortfeasor would be liable to appellants, then the Government is liable; and it is a waste of time to cite *C. J. S.*¹ which refers to Louisiana cases and cases from a few other jurisdictions.

The case of *Offer v. Superior Court*, 194 Cal. 114, 228 Pac. 11, cited in appellants' opening brief (pp. 15-16) definitely establishes that in California an insurer, *upon payment of a loss*, is subrogated *pro tanto* to the insured's rights, and is thereupon entitled to sue the tortfeasor in

¹The same section of *C. J. S.* from which appellee cites, also cites cases from jurisdictions which hold, as California does, that an insurer which has paid all or part of a loss is entitled to bring suit in its own name against the tortfeasor.

its own name (pp. 9-10). This case has never been over-ruled and the rule it establishes finds support and practical application in the following California authorities dealing with various types of insurance including fire:

Fairbanks v. S. F. Ry. Co., 115 Cal. 579, 47 Pac. 450;

Liverpool etc. Ins. Co. v. Southern Pacific Co., 125 Cal. 434, 58 Pac. 55;

Phoenix Ins. Co. v. Pacific Lumber Co., 1 Cal. App. 156, 81 Pac. 976;

Western Indemnity Co. v. Wasco Land etc. Co., 51 Cal. App. 672, 197 Pac. 390;

Morris v. Warner, 207 Cal. 498, 506, 279 Pac. 152;

National Auto Ins. Co. v. Cunningham, 41 Cal. App. (2d) 828, 107 P. (2d) 643;

Pacific Indemnity Co. v. Hargreaves, 36 Cal. App. (2d) 338, 98 P. (2d) 217;

Home Fire Ins. Co. v. Southwestern Engineering Corp., 114 Cal. App. 235, 299 Pac. 771.

Actually, it is common knowledge that such actions are filed by insurers in the California courts daily, and it is certainly peculiar that if the rule is as contended for by appellee that no litigant has brought the matter before an appellate court with a request that the *Offer* case be over-ruled.

And further proof of the unsoundness of appellee's position is found in Section 2071 of the California Insurance Code, which prescribes the California Standard Form Fire Insurance Policy. It is there set forth that

every fire policy issued in California must contain the following provision:

*"Subrogation. * * * This company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom * * *."*²

Appellee's contention amounts to this: that this action may be maintained by plaintiffs and they may recover the full amount of the loss including the amounts paid by the appellants, and then they hold such amounts or a portion thereof as trustees for appellants; but that appellants may not proceed in their own names. In other words, appellee would let the substantive rights of the parties be determined by the superficial test of who is the nominal plaintiff. If the action is brought in the insureds' name, then, says appellee, the full loss can be recovered; if brought in both names then only the uninsured loss can be recovered; and if brought in the insurer's name alone then nothing can be recovered. A more strained and unreasonable construction of the Act could hardly be imagined. Congress either intended to include or exclude claims which had been paid by insurers, but it certainly did not intend the result to be determined by the mere nominal parties to an action. To so hold would be to place form above substance, and attribute to the Act a meaning which never could have been intended.

The absurdity of this position is well pointed out by the Attorney General in ruling that the Small Tort Claims Act included subrogated claims (36 Op. Atty. Gen. 553, 557-8, cited in our opening brief):

²The policies issued by appellants were on the standard form and contained this provision. [Tr. p. 18, para. II; p. 20, para. V.]

“* * * it is quite evident that the mere denial of subrogation claims presented by insurers does not meet the situation. * * * Often it will happen that a claim prosecuted by the owner of damaged property is wholly or in part for the benefit of an insurer and unless in every case the claimant is required to disclose whether he carried insurance, and the principle is applied that he will not be reimbursed by the Government to the extent that his claim is covered by collectible insurance, a discrimination would result in the treatment of those subrogation claims presented by the insured, in whole or in part, for the benefit of an insurer, as compared with claims presented directly by insurance companies.

Merely refusing claims presented by an insurer would not meet the situation. To be consistent, it is necessary to go further and read into the statute a provision that any claim presented by the owner of damaged property will be disallowed to the extent that the loss is covered by collectible insurance.

* * *

* * * It thus appears that to carry out the principle contended for * * * the statute should have contained a provision that the Government shall have the benefit of any insurance carried by the claimant, and no claim shall be certified to the extent covered by collectible insurance. To read such a provision into this statute seems to me to be stretching the rule of strict construction to the breaking point.”

It is submitted that the plain answer to the question is found in the Act itself—apply the simple test of whether the government would be liable to appellants under California law if it were a private individual. Since the answer to that question is in the affirmative, appellants are entitled to intervene,

II.

The Proper Construction of the Act.

Appellee insists that the Act must be construed to limit its scope to the actual person who initially sustained the injury or property damage. The weakness of its position is demonstrated not only by the plain wording of the Act, but also by appellee's admission that in order to arrive at the conclusion urged, it is necessary to read into the Act the word "his" and the words "directly or solely on account of" (p. 11). Appellants do not ask this Court to read anything into the Act; and if it is necessary to read into the Act certain absent language in order to arrive at the construction contended for by appellee, it would seem to follow that such construction is unreasonable and strained. The claim here asserted is directly and solely one for damage to property. The subrogation of appellants to plaintiffs' rights arose by operation of law and in no way changes or affects the nature of the claim, or makes it any less a "claim." To hold that it does results in emasculating the plain provision of the Act that appellee shall be liable to the *same claimants* and to the *same extent* for such property damage, *as if it were a private individual*. To reduce appellee's liability by reason of the fortuitous circumstance of insurance is to read into the Act a provision which is not there, and which is contrary to the express language used.

Appellee contends that the local law provisions of the Act only apply where "the Court has jurisdiction over the subject matter and parties." We cannot follow such reasoning. The Act specifically states that there is "jurisdiction" where the government, if a private person, would be liable under local law. So the answer to the jurisdictional question must be and can only be determined by ap-

plying the local law. If a private individual would be liable under the circumstances present to a certain person under local law for negligent injury to person or property, then the government is liable. The whole intent and purpose of the Act and the plain meaning of the language used is to cover all tort claims of "any person to whom the United States would have been liable prior to the enactment of the Act but for its sovereign immunity."³ Appellants' position is directly in accord with this language and intent and appellees' is directly contrary thereto.

III.

The Anti-Assignment Act (31 U. S. C. A., Sec. 203).

Appellee flatly states (p. 10) that the Anti-Assignment Act (31 U. S. C., Sec. 203) is applicable to subrogated claims, but furnishes neither authority nor argument in support of its assertion. The matter is fully covered in appellants' opening brief (Points IV and V), and we wish only to add thereto a reference to a case reported since the opening brief was filed. We refer to *Coal Operators Casualty Co. v. U. S.* (U. S. D. C., E. D. Pa.), 74 F. Supp. 236 (12/29/47 issue), where the court upheld the right of a compensation carrier to assert its right of subrogation under the Suits in Admiralty Act:

"The Suits in Admiralty Act gives general jurisdiction of the cause of action in this case. There can be no doubt that the libellant insurance carrier could maintain this libel if the ship were privately owned. In the Suits in Admiralty Act (*cit.*), the government has given its consent to be sued in cases in which a proceeding in admiralty could be maintained if the vessel were privately owned or operated."

³See 21 Comp. Gen. 341, Opening Brief p. 26.

IV.

The Hill Case.

Since the filing of appellants' opening brief a case has been reported which directly holds that the Act permits the assertion of subrogated claims thereunder. The case is *Hill, et al. v. United States* (U. S. D. C., N. D. Texas), 74 F. Supp. 129 (12/22/47 issue).⁴ In that case, the individual plaintiffs were riding in an automobile which collided with an Army truck, as a result of which they sustained personal injury and property damage, and the automobile in which they were riding was damaged. The insurance company plaintiff was the collision carrier on the auto and paid the cost of repairing the car. The individual plaintiffs and the insurance carrier plaintiff then joined together in filing this suit to recover for their personal injuries, property damage, and the subrogated claim of the insurance carrier plaintiff. The government moved to dismiss the subrogation claim, on the same grounds here urged, viz., that the Act "does not authorize the maintenance of suits upon derivative claims, and that such claim is prohibited under the Anti-Assignment Act." The District Court denied the motion pointing out at some length the inapplicability of the Anti-Assignment Act. The court then used the following pertinent language:

"Another reason against the motion is rooted in the very language of the Tort Claims Act. It provides that within the bounds of the Act the Government is liable 'to the same claimants, * * * and to the same extent' as a private person under like

⁴Both before and since the filing of appellants' opening brief we made a thorough search of the authorities and this is the only reported case we have been able to find dealing with the precise question here involved.

circumstances, according to the law of the State.
 * * * Under the law of Texas, if the defendant in this suit were an individual instead of the Government, the subrogation claim in question could be maintained. (cits.) * * * The government is likewise suable as to this subrogation claim. This conclusion does not raise any inconsistency with the Anti-Assignment Act, but at most only subordinates that Act to the rather plain and specific language of the later Tort Claims Act.

Some other substantiation may be pointed out from the standpoint of comparative statutes. The two principal statutes waiving the sovereign immunity of the national Government in suits on tort, contain very similar provisions in putting the Government on a parity with a private litigant. These parallel provisions of the Tort Claims Act and the Suits in Admiralty Act, Title 46 U. S. C. A. sec. 741 *et seq.*, are quoted together in the margin for ready comparison. If anything, the Tort Claims Act has the more far-reaching language. In other words, there ought to be as much liberality in the prosecution of suits under the Tort Claims Act as under the Suits In Admiralty Act. The courts have permitted the libelant to amend and claim as an assignee by the purchase of a certain vessel and the cause of action for damages thereto in the collision thereof with another vessel operated by a Government corporation, *Charles Nelson Co. v. United States*, D. C., 11 F. 2d 906, and in a ship owner's libel *in personam* against the Government for damages in a collision between the libelant's ship and a dredge owned by the Government, have permitted the owner of the ship's cargo to intervene. *A. H. Bull S. S. Co. v. United States*, D. C., 21 F. 2d 835.⁵

⁵And see cases cited under Point V, Appellants' Opening Brief.

Lastly, although the Government's motion raises primarily a question of substantive law, still it is sufficiently pertinent to mention briefly that the insurer's subrogation claim is clear of any impediment from a procedural standpoint. The provision of the Tort Claims Act governing procedure is quoted in the margin. Rule 17 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides that every action shall be prosecuted 'in the name of the real party in interest,' and the insurer is such party in the prosecution of its subrogation claim. *McWhirter v. Otis Elevator Co.*, D. C., 40 F. Supp. 11; *Williams v. Powers*, D. C., 2 F. R. D. 362.

The motion herein has been overruled for the several reasons stated."

Dated: Los Angeles, California, January 23, 1948.

Respectfully submitted,

LONG & LEVIT,
PERCY V. LONG,
BERT W. LEVIT,
WILLIAM H. LEVIT,

Attorneys for Appellants.

No. 11745

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the
Estate of David Ciphers Dudley, doing business as
Dave Dudley and Hollywood Leather Goods Mfg.
Co., Bankrupt,

Appellant,

vs.

DAVID CIPHERS DUDLEY, doing business as Dave
Dudley and Hollywood Leather Goods Mfg. Co.,
Bankrupt,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILE

JAN 10 1946

PAUL P. O'BRIEN,

CLERK

No. 11745

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the
Estate of David Ciphers Dudley, doing business as
Dave Dudley and Hollywood Leather Goods Mfg.
Co., Bankrupt,

Appellant,

vs.

DAVID CIPHERS DUDLEY, doing business as Dave
Dudley and Hollywood Leather Goods Mfg. Co.,
Bankrupt,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CRAIG & WELLER

RUSSELL B. SEYMOUR

THOMAS S. TOBIN

Room 817, 111 West Seventh Street
Los Angeles 14, Calif.

For Appellee:

COBB & UTLEY

639 South Spring Street
Los Angeles 14, Calif. [1*]

DEBTOR'S PETITION

Form No. 1

In the District Court of the United States for the
Southern District of California
Central Division

In Bankruptcy No. 44706-Y

In the Matter of DAVID CIPHERS DUDLEY, dba
DAVE DUDLEY and HOLLYWOOD LEATHER
GOODS MFG. CO.,

Bankrupt.

To the Honorable.....Judge of the
District Court of the United States for the Southern
District of California:

The Petition of David Ciphers Dudley, dba Dave Dudley and Hollywood Leather Goods Mfg. Co., residing at No. 1201 N. Gower St., Apt. 232, in the County of Los Angeles, State of California, by occupation a leather goods manufacturer, and employed by.....
(or engaged in the business of leather goods manufacturing), respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at 1463 North Vine Street, Hollywood, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

DAVID CIPHERS DUDLEY

Petitioner

COBB & UTLEY

By Francis B. Cobb

Attorneys for Petitioner

[Verified.] [2]

SUMMARY OF DEBTS AND ASSETS
(From the Statements of the Debtor in
Schedules A and B)

		Dollars	Cents
Schedule A....1—a	Wages	839.65	
Schedule A....1—b (1)	Taxes due United States	8043.48	
Schedule A....1—b (2)	Taxes due States.....	835.24	
Schedule A....1—b (3)	Taxes due counties, districts and municipi- palities	20.82	
Schedule A....1—c (1)	Debts due any person, including the United States, having prior- ity by laws of the United States	none	
Schedule A....1—c (2)	Rent having priority....	none	
Schedule A....2	Secured claims.....	9423.57	
Schedule A....3	Unsecured claims.....	19,209.73	
Schedule A....4	Notes and bills which ought to be paid by other parties thereto	none	
Schedule A....5	Accommodation paper..	none	
Schedule A, total		\$38,372.49	
<hr/>			
Schedule B....1	Real estate	none	
Schedule B....2—a	Cash on hand.....	40.00	
Schedule B....2—b	Negotiable and non-ne- gotiable instruments and securities.....	none	
Schedule B....2—c	Stocks in trade.....	5361.48	
Schedule B....2—d	Household goods.....	750.00	
	Wearing apparel.....	300.00	

		Dollars	Cents
Schedule B....2—e	Books, prints and pictures		none
Schedule B....2—f	Horses, cows and other animals		none
Schedule B....2—g	Automobiles and other vehicles	1875.00	
Schedule B....2—h	Farming stock and implements		none
Schedule B....2—i	Shipping and shares in vessels		none
Schedule B....2—j	Machinery, fixtures, and tools	12,183.50	
Schedule B....2—k	Patents, copyrights, and trade-marks		none
Schedule B....2—l	Other personal property		unknown
Schedule B....3—a	Debts due on open accounts	4292.50	
Schedule B....3—b	Policies of insurance....		no value
Schedule B....3—c	Unliquidated claims.....		none
Schedule B....3—d	Deposits of money in banks and elsewhere	2779.65	
Schedule B....4	Property in reversion, remainder, expectancy or trust.....	2500.00	
Schedule B....5	Property claimed as exempt	3550.00	
Schedule B....6	Books, deeds and papers		none
		<hr/>	
		Schedule B, total	\$30,082.13
		<hr/>	

David Ciphers Dudley Petitioner

SCHEDULE A.

STATEMENT OF ALL DEBTS OF BANKRUPT

Schedule A-1.

Statement of all creditors to whom priority is secured by the act.

A.—Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding \$600 each, earned within three months before filing the petition

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.

	Amount due or Claimed. Dollars Cents
Cyril Baxstresser, 254 Columbia Place, Los Angeles 26, Calif.	104.25
Pauline Edwards, 668 Cypress Avenue, Los Angeles 31, Calif.	91.03
Morris Febber, Tahoe Hotel, Venice, Calif.	103.37
Reeves Buttner, 9928 Provo Avenue, Tujunga, Calif.	16.54
Joe Greenberg, 205 South Fuller, Los Angeles 36, Calif.	251.58
Richard G. Smith, 660 S. Stanford, Los Angeles, Calif.	210.78

	Amount due or Claimed. Dollars Cents
A.Brady, 144½ West Avenue 31, Los Angeles 31, Calif.	62.10

B.—Taxes due and owing to—(1) The United States	\$8043.48
(2) The State of California.....	835.24
(3) The county, district or municipality of Los Angeles	20.82
..... State of.....	

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt; and whether incurred or contracted as partner or joint contractor and, if so, with whom.

City of L. A. sales taxes—	\$20.82	U. S. Government	
State sales tax	\$106.27	Excise taxes	\$927.49
State—SUI employees	94.24	FOB employees	94.24
State—SUI employer	480.22	FOB employer	177.86
State—income tax	154.51	WH	1990.53
	—	FUI	53.36
	\$835.24	Income tax (?)	4800.00
			<hr/>
			\$8043.48

C.—(1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority.

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that

Amount due
or Claimed.
Dollars Cents

fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt; and whether incurred or contracted as partner or joint contractor and, if so, with whom.

None

none

C.—(2) Rent owing to a landlord who is entitled to priority by the laws of the State of, accrued within three months before filing the petition, for actual use and occupancy.

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt; and whether incurred or contracted as partner or joint contractor and, if so, with whom.

None

none

Total \$9739.19

David Ciphers Dudley Petitioner

Schedule A-2.

Creditors Holding Securities

N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—Description of Securities.—When and where debts were contracted, and nature and consideration thereof.—Whether claim is contingent, unliquidated or disputed.

	Value of Securities		Amount due or Claimed.	
	Dollars	Cents	Dollars	Cents
I. M. Ward, 900 S. Main Street, Los Angeles, Calif.	309.00		159.00	
Conditional sales contract covering three show cases located at 1645 Cahuenga Boulevard, Hollywood, California				
Bank of America N. T. & S. A., Gower & Sunset Branch, Los Angeles, California	12,750.00		6236.25	
Conditional sales contract on household furnishings located at 1201 N. Gower St., Apt.				

	Value of Securities		Amount due or Claimed.	
	Dollars	Cents	Dollars	Cents
232, Los Angeles, California, machinery & equipment, fur- niture & fixtures at 1121 Lil- lian Way, 1755½ Glendale Blvd., and 1463 N. Vine Street, Los Angeles, Calif. approx.				
Bank of America N. T. & S. A., Gower & Sunset Branch, Los Angeles, California				
Chattel mortgage on 1941 Pontiac 8 Sedan	1,250.00		969.84	
Chattel mortgage on 1939 Pontiac Club Coupe	625.00		558.48	
Andy H. & Fannie Anderson, 1895 Indianapolis Ave., Riv- erside, California	4,000.00		1500.00	
Conditional sales agreement and note covering business, machinery and equipment, furniture and fixtures at 1645 Cahuenga Blvd.				
<hr/>				
	Total		\$9,423.57	
David Ciphers Dudley Petitioner				
(3)				
[5]				

Schedule A-3.

Creditors whose Claims are Unsecured

(N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person: and, if so, with whom.

	Amount due or Claimed.	
	Dollars	Cents
Acorn Supply, 1022 W. 11th Street, Los Angeles, Calif.	4.85	
Alberta Prods, 246 East 44th Street, New York, N. Y.	28.10	
Algene Mfg. Co., 583 Sixth Ave., N. Y., N. Y.	50.40	
Alzheimer & Baer, 1436 Merchandise Mart, Chicago, Ill.	904.30	
American Mfg. Co., Chattanooga, Tenn.	158.81	
American Linen, 201 N. Westmoreland Ave., Los Angeles, Calif.	2.54	

	Amount due or Claimed.	
	Dollars	Cents
American Type Founders, 200 Elmora Ave., Elizabeth B., New Jersey		18.85
Andrews Hdwe. & Metal, 334 S. Main Street, Los Angeles, Calif.		288.65
Artcraft Paper Box Co., 1054 W. Slauson Ave., Los Angeles, Calif.		151.95
Barker-Allen Elec., 1624 Cahuenga Blvd., Hollywood, Calif.		97.04
Wray Bertholf, 6128 Hollywood Blvd., Holly- wood, Calif.		52.50
Bulwin Mfg., 341 Wall, Los Angeles, Calif.		12.75
C. & H. Prods., 617 S. Olive St., Los Angeles, Calif		70.50
Calif. Jewelry, 424 S. Broadway, Los Angeles, Calif.		42.00
Calif. Piece Dye Wks., 344 S. Avenue 17, Los Angeles, Calif.		17.50
Century Sheet Metal, 6324 Santa Monica Blvd., Los Angeles, Cal.		20.10
Century Specialty, 412 S. Wells St., Chicago, Ill.		107.35
Citizens News, 1545 N. Wilcox Ave., Holly- wood, Calif.		262.70
Citro Mfg. Co., 414 Broadway, New York, N. Y.		72.18
City transportation, 1120 S. Olive St., Los Angeles, Calif.		38.68
Classy Novelty Corp., 1261 Broadway, New York, N. Y.		114.10

	Amount due or Claimed.	
	Dollars	Cents
Herbert A. Cohen, 116 New Montgomery St., San Francisco, Calif.	74.25	
Continental Detective, 124 W. 6th Street, Los Angeles, Calif.	25.00	
Day Lite Dist. Co., 8200 Long Beach Blvd., Los Angeles, Calif.	128.79	
Dept. of Water & Power, 207 S. Broadway, Los Angeles, Calif.	38.76	
Enger-Kress Co., West Bend, Wisconsin	13.88	

Total

David Ciphers Dudley Petitioner

(4)

[6]

Schedule A-3 Continued

Creditors whose Claims are Unsecured

(N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact must be stated).—When and where contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and con-

sideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person: and, if so, with whom.

	Amount due or Claimed.	
	Dollars	Cents
Fenichel Leather Goods Co., 444 Broome St., New York	42	75
Firman Leather Goods Co., 48 Walker St., New York	360	90
Fresh Puro Water, 4430 York Blvd., Los An- geles, Calif.	13	59
General Bldg., Serv., 5610 Camellia Ave., North Hollywood, Calif.	231	00
Thomas H. Gibbons, 509 S. Franklin St., Chicago, Ill.	538	30
Golden State Leather, 3155 S. Olive Street, Los Angeles, Calif.	64	00
Gould & Lending, 4453 Whittier Blvd., Los Angeles, Calif.	36	90
Arthur E. Gray, 2510 Sunset Blvd., Los An- geles, Calif.	19	39
Great Western Steel Co., 1011 E. 61st St., Los Angeles, Calif.	15	08
Halvorfold-Kwikprint Co., 700 E. Union St., Sta. G., Jacksonville, Fla.	10	13
John Hassall Inc., Clay & Oakland Sts., Brooklyn 22, N. Y.	207	38
Hebb Lea. Co., Inc., 112 Beach St., Boston, Mass.	3752	64
Holly-Beverly Type. Co., 1649 N. Wilcox Ave., Los Angeles, Calif.	8	75

	Amount due or Claimed.	
	Dollars	Cents
Independent Directory, 610 S. Broadway, Los Angeles, Calif.	30.00	
Stanley O. Jacobs Co., 315 W. Fifth St., Los Angeles, Calif.	26.93	
Jay-Dee Lea., P. O. Box J. D., Redwood City, Calif.	138.00	
Harold B. King, 530 W. 6th Street, Los Angeles, Calif.	98.82	
Kingsley Stamping, 1606 Cahuenga, Hollywood, Calif.	2.58	
Knight Lea. Prod. Co., 712 Beacon St., Boston, Mass.	285.00	
Leather Supply Co., 909 S. Hill Street, Los Angeles, Calif.	159.94	
Lewis Transfer Co., 1025 Wall St., Los Angeles, Calif.	19.91	
P. B. McMillen, 2430 Lister Ave., Kansas City, Mo.	27.30	
MacPherson Leather Co., 250 S. Spring Street, Los Angeles, Calif.	265.96	
Manufacturers Supplies, 716 N. 18th St., St. Louis, Mo.	112.80	
H. S. Means Co., 5894 W. Adams Blvd., Culver City, Calif.	30.20	

Total

David Ciphers Dudley Petitioner

Schedule A-3, Continued

Creditors whose Claims are Unsecured

	Amount due or Claimed.	
	Dollars	Cents
J. A. Meyers, 1031 W. 7th Street, Los Angeles, Calif.	90.45	
Monarch Alarm Burglar, 1101 W. Olympic, Los Angeles, Calif.	14.04	
Moore Business Forms, 5750 Hollis St., Emeryville, Calif.	221.72	
Dr. E. E. Moran, 6312 Sunset Blvd., Hollywood, Calif.	5.00	
Mutual Brief Case Co., 133 Kossuth St., Newark, N. J.	140.76	
New Bedford Luggage Co., 274 Belleville Ave., New Bedford, Mass.	554.04	
Olympic Luggage Corp., P. O. Box 159, Kane, Pa.	152.40	
Pacific Hide & Leather Co., 718 E. Washington Blvd., Los Angeles, Calif.	46.95	
Pacific Metals Co., 1400 S. Alameda St., Los Angeles, Calif.	89.20	
Peter's Bag & Novelty Corp., 3 W. 18th St., New York, N. Y.	3.00	
Photo Luggage Supply, 130-42 87th Ave., Jamaica, N. Y.	67.60	
W. W. Pritchard, 543 W. Alice, Inglewood, Calif.	62.56	
Presto Lock Co., 100 Outwater Lane, Garfield, N. J.	5.29	

	Amount due or Claimed.	
	Dollars	Cents
Prime Leather, 101 Beekman St., New York 7, New York	204.20	
Progress Case & Bag Co., 1100 W. Washing- ton Blvd., Chicago 7, Ill.	142.80	
Quick Service Transfer Co., 765 Stanford Ave., Los Angeles, Cal.	22.66	
Rau Fastener Co., 102 Westfield St., Provi- dence, R. I.	88.00	
The Robbins Co., Attleboro, Mass.	235.30	
Sherwood Mfg. Co., 1824 Magnolia Ave., Los Angeles, Calif.	18.00	
Seward Truck & Bag Co., Petersburg, Virginia	114.60	
The Sheldon Co., 2143 S. Los Angeles St., Los Angeles, Calif.	5.50	
Stephens, Inc., 182 N. Hawthorne Blvd., Haw- thorne, Calif.	76.97	
So. Calif. Gas Co., Hollywood Sta., Box 2111, Hollywood, Calif.	8.56	
So. Calif. Tele. Co., 1429 N. Gower St., Los Angeles 28, Calif.	180.42	
S. V. Co., 700 Oakford Dr., Los Angeles, Calif.	15.00	
Talon, Inc., 762 E. Pico Street, Los Angeles, Calif.	51.49	
Travel Prods., 900 Fifth Ave., Pittsburgh, Pa.	181.65	
Trojan Lacquer, 4090 E. Washington Blvd., Los Angeles, Calif.	11.80	

David Ciphers Dudley Petitioner

Schedule A-3, Concluded
Creditors whose Claims are Unsecured

	Amount due or Claimed.	
	Dollars	Cents
Unexcelled Die & Supply Co., 4722 Newcove Pl., St. Louis, Mo.	118.03	
Universal Craftsmen Co., 354 Fourth Ave., New York, N. Y.	172.50	
U. S. Luggage & Leather Prods. Co., 29 W. 34th St., N. Y.	117.74	
Unique Leather Goods Co., 747 S. Hill St., Los Angeles, Calif.	7.50	
Valley Express Co., 605 W. 7th Street, Los Angeles, Calif.	.90	
Western Felt Works, 4029 Ogden Ave., Chicago, Illinois	22.25	
Wildberg Bros., 635 S. Hill St., Los Angeles, Calif.	1383.86	
Wilson Gold Stamp Mach. Co., 1855 Hillhurst Ave., Hollywood, Cal.	7.21	
Markham Properties, 1545 N. Wilcox Ave., Hollywood, Calif.	150.00	
Citizens National Bank, 457 S. Spring St., Los Angeles, Calif.	125.00	
Truck Ins. Exchange, 4680 Wilshire Blvd., Los Angeles, Calif.	unknown	
Imogen Dudley, aka Emma Jean Dudley, ad- dress unknown	5000.00	
Burk Mathes, attorney for Imogene Dudley 426 Rowan Building, Los Angeles, California		
Total.....	\$19,209.73	

David Ciphers Dudley Petitioner

Schedule A-4.

Liabilities on Notes or Bills Discounted which ought to be Paid by the Drawers, Makers, Acceptors, or Indorsers.

(N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, acceptors, or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as indorser.)

Reference to Ledger or Voucher.—Names of holders as far as known.—Residences (if unknown, that fact must be stated).—Place where contracted.—Whether claim is disputed.—Nature and consideration of liability, whether same was contracted as partner or joint contractor, or with any other person: and, if so, with whom.

Amount due
or Claimed.
Dollars Cents

None

None

Total None

David Ciphers Dudley Petitioner

Schedule A-5.

Accommodation Paper.

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated with his residence. Give same particulars as to other commercial paper.)

Reference to Ledger or Voucher.—names of Holders.—Residences (if unknown, that fact must be stated).—Names and residences of persons accommodated.—Place where contracted.—Whether claim is disputed.—Whether liability was contracted as partner or joint contractor, or with any other person: and, if so, with whom.

	Amount due or Claimed. Dollars Cents
None	None
Total None	
Dave Dudley	
David Ciphers Dudley Petitioner	

OATH TO SCHEDULE A

State of California
County of Los Angeles—ss..

I, David Ciphers Dudley, the person whose name subscribed to the foregoing schedule, do hereby make solemn

oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

David Ciphers Dudley
Petitioner

Subscribed and sworn to before me this 10 day of January, 1947.

Blanche Morris
Notary Public in and for said County and State
(Official Character.)

(6) [11]

SCHEDULE B.
STATEMENT OF ALL PROPERTY OF
BANKRUPT
Schedule B-1.
Real Estate

Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.

Estimated value
of Debtor's
Interest.
Dollars Cents

None

None

Total None

David Ciphers Dudley Petitioner

(7) [12]

Schedule B-2
Personal Property

A.—Cash on hand

Dollars Cents
\$ 40.00

B.—Negotiable and non-negotiable instruments and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately)

none

none

C.—Stock in trade, in.....business of leather goods manufacturer, at 1645 Cahuenga Blvd., of the value of Western silver buckles, hand carved belts, bill folds, luggage, etc.

\$ 5,361.48

D.—Household goods and furniture, household stores, wearing apparel and ornaments of the person

Household goods and furniture (subject to conditional sales contract held by Bank of America)	750.00
Wearing apparel	300.00

Total 6,451.48

David Ciphers Dudley Petitioner

Schedule B-2—Continued
Personal Property

E.—Books, Prints, and Pictures

None

Dollars Cents
None

F.—Horses, Cows, Sheep, and other animals
(with number of each)

None

None

G.—Automobiles and other Vehicles

1941 Pontiac 8 Sedan

1250.00

1939 Pontiac Club Coupe

625.00

(subject to conditional sales contract or
chattel mortgage held by Bank of
America)

H.—Farming Stock and Implements of Hus-
bandry

None

None

Total

\$ 1875.00

David Ciphers Dudley Petitioner

(9)

[14]

Schedule B-2—Continued
Personal Property

I.—Shipping, and Shares in Vessels

None

Dollars Cents
None

J.—Machinery, fixtures, apparatus, and tools
used in business, with the place where
each is situated

	Dollars	Cents
machinery and equipment, furniture & fixtures, 1121 Lillian Way	\$	4634.50
machinery and equipment, furniture & fixtures, 1755½ Glendale Blvd.	\$	5549.00
(mortgaged to Bank of America and leased to Farrell Burton, Jr.)		
furniture & fixtures, 1463 N. Vine Street		2000.00
(mortgaged to Bank of America)		
furniture and fixtures, 1645 N. Cahuenga Blvd.		Unknown
(mortgaged to Andy H. & Fannie Anderson)		

K.—Patents, Copyrights, and Trade-Marks	
None	None

L.—Goods or personal property of any other description, with the place where each is situated	
Lease dated December 21st, 1946 between Dave Dudley and Farrell Burton, Jr., covering certain machinery and equipment, furniture and fixtures, payable at the rate of \$55.00 per month	Unknown

Total 12,183.50

David Ciphers Dudley Petitioner

Schedule B-3
Choses in Action

A.—Debts Due Petitioner on Open Account		Dollars	Cents
See attached schedule		\$	4292.50
B.—Policies of Insurance			
Misc. policies of insurance			no value
C.—Unliquidated Claims of every nature, with their estimated value			
none			none
D.—Deposits of Money in Banking Institu- tions and Elsewhere			
State Sales Tax Division, State of Cali- fornia			25.00
Bank of America, Sunset & Gower Branch, Los Angeles, Calif., subject to Bank's lien			2754.65
Total		\$	7,072.15
David Ciphers Dudley Petitioner (11)			[16]

A.—Debts Due Petitioner on Open Account

T. V. Allen, 1025 W. 7th Street, Los Angeles, Calif.	126.09
Burtons, Ltd., 629 S. Hill St., Suite 900, Los Angeles, Cal.	2913.38
Cook's Jewelers, P. O. #426, Ajo, Arizona	10.29
J. W. Gupton, Jeweler, 1140 E. 10th St., Tuc- son, Arizona	43.46

	Dollars	Cents
Morrison's Jewelry Store, 146 Holt Ave., Pomona, Calif.		14.21
Phipps Jewelry Store, Hot Springs, New Mexico		55.00
J. Rohde, 1037 Euclid St., St. Monica Beach, Calif.		43.00
Western Silversmith, L. R. Richmond, 832 N. Edinburgh Ave., Los Angeles, Calif.		83.34
Western Electric Co., 6601 Romaine, Los An- geles, Calif.		281.19
Strasburg Jewelers, 6750 Hollywood Blvd., Hollywood, Calif.		2.50
Hollywood State Bank, Santa Monica & High- land, Hollywood, Cal.		49.20
Twentieth Century Fox, Hollywood, Calif.		5.00
Brown Derby Corp., 1628 N. Vine St., Holly- wood, Calif.		12.88
I. Magnin Co., 3240 Wilshire Blvd., Los An- geles 5, Calif.		6.00
Saks Fifth Ave., 9700 Wilshire Blvd., Los An- geles, Calif.		26.00
Mayfair Sports Shop, 1644 Wilcox Ave., Los Angeles, Calif.		22.87
Broadway Hollywood, Dept. 37, Hollywood & Vine, Hollywood, Cal.		143.85
Broadway Hollywood, Dept. 33, Hollywood & Vine, Hollywood, Cal.		269.40
C. D. Baxstresser, 254 Columbia Place, Los Angeles, Calif.		75.00
Hollywood Luggage Co., 312 South Bixel St., Los Angeles, Cal.		109.84

Total . . . — \$4292.50

Schedule B-4.

Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

(N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.)

General Interest.	Particular Description.	Estimated value of Interest.	
		Dollars	Cents
Interest in Land			
	3 year lease on property at 1463 N. Vine street		
	3 year lease on property at 1645 Cahuenga Boulevard		unknown
<hr/>			
Personal Property			
	1 complete set of hand carving stamps and leather workers tools		\$1500.00

		Estimated value of Interest. Dollars Cents	
Property in Money, Stock, Shares, Bonds, Annuities, etc.		none	none
<hr/>			
Rights and Powers, Legacies and Bequests			
10 fully paid shares, evidenced by Cer- tificate No. 2734, issued by Hollywood Building & Loan Association			1000.00
		<hr/>	
		Total	2500.00
<hr/> <hr/>			

Property heretofore conveyed for benefit
of creditors.

Amount
realized as
proceeds of
property
conveyed

Portion of debtor's property conveyed by deed
of assignment, or otherwise, for the benefit
of creditors; date of such deed, name and
address of party to whom conveyed;
amount realized therefrom, and disposal of
same, as far as known to debtor.

Attorney's Fees.

Sum or sums paid to counsel, and to whom,
for services rendered or to be rendered in
this bankruptcy.

Cobb & Utley, fees and expenses	500.00
---------------------------------	--------

Total

David Ciphers Dudley Petitioner

Schedule B-5.

Property claimed as exempt from the operation of the act of Congress relating to bankruptcy.

(N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.)

Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption.

None

Valuation
Dollars Cents
None

Property claimed to be exempt by State laws, with reference to the statute creating the exemption.

Household goods, furniture, wearing apparel 1050.00

Section 690.1, 690.2 C. C. P.

10 fully paid shares, evidenced by Certificate No. 2734, issued by Hollywood Building & Loan Association 1000.00

Section 690.21, 690.12 C. C. P.

1 complete set of hand carving stamps and leather workers tools 1500.00

Section 690.4 C. C. P.

Total 3550.00

David Ciphers Dudley Petitioner

Schedule B-6.

Books, Papers, Deeds and Writings relating to
Debtor's Business and Estate

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody, or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books

Dollars Cents

Books and records of business, located at
office 1463 North Vine Street

none

Deeds

none

none

Papers

located at office at 1463 North Vine Street

none

David Ciphers Dudley Petitioner

OATH TO SCHEDULE B

State of California

County of Los Angeles—ss.

I, David Ciphers Dudley, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

David Ciphers Dudley Petitioner

Subscribed and sworn to before me this 10th day of January, 1947.

Blanche Morris

Notary Public in and for said County and State
(Official Character)

(14)

[Endorsed]: Filed Jan. 11, 1947. Edmund L. Smith,
Clerk. [20]

United States District Court
Southern District of California

ORDERS OF ADJUDICATION AND OF
GENERAL REFERENCE

At Los Angeles, in said District, on January 11, 1947.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 44,706-Y.

Title of Proceedings David Ciphers Dudley, dba Dave Dudley, and Hollywood Leather Goods Mfg. Co.

Filed 1-11-47.

Referee Hugh L. Dickson, Esq., Los Angeles, Calif.

JACOB WEINBERGER

United States District Judge

[Endorsed]: Filed Jan. 11, 1947. Edmund L. Smith,
Clerk. [21]

Receiver or Trustee	Bond No. S-425153
in Bankruptcy	Premium: \$40.00 per annum
	[Crest]

ASSOCIATED INDEMNITY CORPORATION

Head Office

332 Pine Street, San Francisco

In the District Court of the United States for the
Southern District of California

Central Division

No. 44706-Y In Bankruptcy

In the Matter of DAVID CIPHERS DUDLEY, doing
business as DAVE DUDLEY and HOLLYWOOD
LEATHER GOODS MFG. CO.,

Bankrupt.

BOND OF TRUSTEE

Know All Men by These Presents, That we, George T. Goggin of Los Angeles, California, as Principal, and Associated Indemnity Corporation, a corporation organized and existing under the laws of the State of California and having its principal office in the City and County of San Francisco, State of California, as surety, are held and firmly bound unto the United States of America, in the sum of Ten Thousand and No/100 Dollars, (\$10,000.00), in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed and Sealed, this 5th day of February, A. D.
1947.

The Condition of this obligation is such, that whereas the above named George T. Goggin was on the 4th day of February, A. D. 1947, appointed Trustee in the case pending in bankruptcy in the said Court wherein David Ciphers Dudley, doing business as Dave Dudley and Hollywood Leather Goods Mfg. Co. is the Bankrupt, and he, the said George T. Goggin has accepted said trust with all the duties and obligations pertaining thereto:

Now, Therefore, if the said George T. Goggin as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of the said Bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise to remain in full force and virtue.

[Seal]

GEORGE T. GOGGIN

ASSOCIATED INDEMNITY CORPORATION

By H. S. Vreeland Attorney-in-Fact

State of California

County of Los Angeles—ss.

On this 5th day of February, in the year one thousand nine hundred and forty-seven, before me, H. W. Smith, a Notary Public in and for said..... County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared H. S. Vreeland, known to me to be the Attorney in Fact of the Asso-

ciated Indemnity Corporation, the corporation described in and that executed the within and foregoing instrument, and known to me to be the person who executed the said instrument on behalf of the said corporation, and he duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said County of Los Angeles, the day and year in this certificate first above written.

(Seal)

H. W. SMITH

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires Sept. 22, 1947.

Signed and sealed in the presence of .

.....

.....

.....

Examined and Recommended for Approval
as provided in Rule 28.

Approved the 7 day of February, A. D. 1947.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed Feb. 7, 1947. Hugh L. Dickson,
Referee.

[Endorsed]: Filed Feb. 17, 1947. Edmund L. Smith,
Clerk. [22]

[Title of District Court and Cause]

REFEREE'S CERTIFICATE ON REVIEW

I, Hugh L. Dickson, Referee in Bankruptcy in charge of this proceeding, do hereby certify that on the 21st day of March, 1947, I made and entered an Order herein sustaining the trustee's refusal to set aside to the bankrupt as exempt certain shares of stock in a building and loan association claimed exempt by him under provisions of Section 6 of the National Bankruptcy Act, and Section 690.21 of the Code of Civil Procedure of California, and overruling the exceptions of the bankrupt and the Trustee's Report of exempt property, a copy of which Order is hereto attached and herewith certified up.

STATEMENT OF EVIDENCE

At the time of the hearing on the exceptions to the Trustee's Report of exempt property it was stipulated between Messrs. Cobb & Utley, attorneys for the bankrupt, and Messrs. Craig & Weller, attorneys for the trustee, that testimony taken at the [23] examination of the bankrupt previously had could be considered by the Referee in determining the issues.

This evidence showed that prior to his bankruptcy the bankrupt was hopelessly insolvent and contemplated going through bankruptcy for the purpose of discharging his debts. While heavily in debt and clearly insolvent and while preparing his Petition in Bankruptcy to be filed in this court approximately one week before the filing of his voluntary petition the bankrupt acquired building and

loan stock of the value of \$1,000.00 for the purpose of claiming the same as exempt and preventing his creditors from realizing on this clearly non-exempt cash. He claimed the same as exempt together with household goods, furniture and wearing apparel of a value of \$1050.00, and a complete set of hand carving stamps and leather working tools of a value of \$1500.00. The trustee set aside the household goods, furniture and wearing apparel and the complete set of hand carving stamps and leather working tools to the bankrupt as exempt, but refused to set the shares of building and loan stock aside as exempt to the bankrupt.

The sole question to be determined is whether or not a bankrupt on the eve of bankruptcy and with the intent to withdraw from his bankrupt estate non-exempt cash or other assets, can for that express purpose, purchase exempt property out of his non-exempt assets and have them set aside to him as exempt in defiance of the rights *of the rights* of his creditors.

In determining this question in the negative I was satisfied from the evidence before me that the bankrupt had acted in bad faith deliberately and with a fraudulent intent on his part, and that seeking relief from the burden of his debts in a court operating on the equity side he should not be permitted to retain this property which was belatedly purchased by him in contemplation of bankruptcy and for the purpose of retaining it from his creditors.

I accordingly overruled the bankrupt's exceptions to [24] the Trustee's Report of exempt property and confirmed the same whereupon the bankrupt filed his petition for review.

I hereby certify to the District Judge the following papers:

1. Bankrupt's Voluntary Petition and Schedules (by reference).
2. Order of Adjudication (by reference).
3. Trustee's Report of Exempt Property.
4. Objections to Trustee's Report of Exempt Property by Bankrupt.
5. Memorandum of Opinion.
6. Findings of Fact, Conclusions of Law and Order re Exempt Property.
7. Petition for Review of Referee's Findings of Fact, Conclusions of Law and Order re Exempt Property.
8. This Certificate.

Respectfully submitted, this 23 day of May, 1947.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed May 23, 1947. Edmund L. Smith,
Clerk. [25]

[Title of District Court and Cause]

TRUSTEE'S REPORT OF EXEMPT PROPERTY

At Los Angeles, California, on the 19th day of February, 1947.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property under the provisions of the Acts of Congress relating to Bankruptcy.

General Head	Particular Description	Value
<hr/>		
Military Uniform, Arms, and Equipment:		
Property Exempt under State Law:		
Household Goods, Furniture, Wearing Apparel		\$1,050.00
1 Complete Set of Hand Carving Stamps and Leather Workers Tools		1,500.00

Trustee Refuses to Exempt the Following:

10 Fully Paid Shares, Evidenced by Certificate No. 2734 Issued by Hollywood Building & Loan Association	\$1,000.00
CC – Cobb & Utley, Attorneys for Bankrupt	
CC – Frank C. Weller, Attorney for Trustee	

GEORGE T. GOGGIN

Trustee

[Endorsed]: Filed Feb. 20, 1947. Hugh L. Dickson,
Referee.

[Endorsed]: Filed May 23, 1947. Edmund L. Smith,
Clerk. [26]

[Title of District Court and Cause]

OBJECTIONS TO TRUSTEE'S REPORT OF
EXEMPT PROPERTY

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

Now comes David Ciphers Dudley, the above named bankrupt, and objects to the trustee's report of exempt property in respect to that portion of the trustee's report filed herein on the 19th day of February, 1947, wherein said report so filed refuses to exempt ten (10) fully paid shares evidenced by Certificate No. 2734, issued by the Hollywood Building & Loan Association of the value of One Thousand Dollars (\$1,000.00).

The ground of exemption sets forth that said Certificate No. 2734 issued by the Hollywood Building & Loan Association, is exempt under Section 690.21 and Section 690.12 of the Code of Civil Procedure of the State of California, and that the same was claimed exempt by the above named bankrupt in his schedules on file herein, and that the bankrupt is entitled to have the same allowed pursuant to Section 6 of the Bankruptcy Act as amended.

Wherefore, your petitioner prays that the above entitled court [27] enter an order sustaining this objection to the Trustee's report of exempt property in connection with disallowance of the bankrupt's claim of exemption to Certificate No. 2734 of the Hollywood Building & Loan Association, and that the above entitled Court allow said certificate and the shares evidenced thereby to the above

named bankrupt as exempt property as provided by Section 6 of the Bankruptcy Act as amended, and Sections 690.21 and 690.12 of the Code of Civil Procedure of the State of California.

DAVID CIPHERS DUDLEY, Bankrupt
Petitioner

[Verified.] [28]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 26, 1947. Hugh L. Dickson,
Referee.

[Endorsed]: Filed May 23, 1947. Edmund L. Smith,
Clerk. [29]

[Title of District Court and Cause]

MEMORANDUM OF OPINION

In this matter there is claimed as exempt Building & Loan stock in the amount of One Thousand Dollars (\$1,000.00), which was purchased by the bankrupt approximately one (1) week before filing his voluntary petition in bankruptcy and at a time when he was heavily in debt and clearly insolvent, and in the course of preparing his petition in bankruptcy.

In the matter of Roy J. Gorman, Bankrupt, 14 A. B. R., N. S. 145, decided by Referee Earl Moss and affirmed upon review by Judge Wm. P. James on October 2, 1929, it was held that "bankrupt may not on the eve of filing a petition in bankruptcy, and for the fraudulent purpose

of withholding non-exempt property from his creditors, convert it into exempt property and have allowed his exemption."

Therefore, I hold that this property consisting of Building & Loan stock is not exempt under the circumstances under which it was purchased.

The attorney for Trustee will kindly prepare appropriate findings and submit same to the opposing counsel for approval as to form.

Dated: February 19, 1947.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed May 23, 1947. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE EXEMPT PROPERTY

The Trustee herein having filed a return of exempt property and having denied exemption of ten shares of stock in the Hollywood Building and Loan Association of the value of \$1,000.00, and the bankrupt having filed objections thereto and the hearing on the said return and the objections thereto having been set for March 6, 1947, at 10:00 o'clock A. M. before Honorable Hugh L. Dickson, Referee in Bankruptcy, and Cobb & Utley, attorneys for the bankrupt, and Craig & Weller, attorneys for George T. Goggin, Trustee herein, having entered into a written Stipulation that all of the evidence heretofore

adduced at the first meeting of creditors might be considered as having been reintroduced at the hearing on said objections without the necessity of taking any further or additional evidence in this particular matter, and that the matter might be submitted on the evidence as introduced, and that the court might make his order based upon such evidence, and the matter having been submitted upon [31] said Stipulation and the evidence referred to therein, the court now finds as follows:

FINDINGS OF FACT

I.

The Court finds that the bankrupt, David Ciphers Dudley, doing business as Dave Dudley and Hollywood Leather Goods Mfg. Co., approximately one week prior to the filing of his petition in bankruptcy herein on the advice of his counsel used the sum of \$1,000.00 in cash for the purpose of purchasing ten shares of stock in the Hollywood Building and Loan Association, and that at the time that said purchase was made the said above named bankrupt was heavily in debt and was clearly insolvent, and that said purchase was made in contemplation of and while he was preparing to file a petition in bankruptcy, and the same was made for the specific purpose of removing said sum of \$1,000.00 from the reach of his creditors by placing the same in property considered exempt under the laws of the State of California, and the court finds that the said bankrupt in so converting non-exempt assets into those which the laws of the State of California declared exempt acted in bad faith with the corrupt design and intent to cheat and defraud his creditors.

CONCLUSIONS OF LAW

I.

As a conclusion of law from the foregoing facts the court finds that said conversion of assets was fraudulent as to creditors under Section 70 of the Bankruptcy Act, and that the trustee's return of exempt property in which he denied exemption to said Building and Loan stock should be approved.

II.

The court finds that as to said property so converted the trustee was vested with title to property as transferred by the bankrupt in fraud of his creditors under provisions of Section 20-a of National Bankruptcy Act, and is entitled to recover the same for the [32] benefit of the bankrupt estate.

III.

The court concludes that the trustee is now the owner of said shares of stock and entitled to the custody and control thereof.

ORDER

Upon the foregoing Findings of Fact and Conclusions of Law it is ordered that the trustee's return of exempt property filed herein be, and the same hereby is, approved.

Dated: This 21 day of March, 1947.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed Mar. 21, 1947. Hugh L. Dickson, Referee.

[Endorsed]: Filed May 23, 1947. Edmund L. Smith, Clerk. [33]

[Title of District Court and Cause]

PETITION FOR REVIEW OF REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE EXEMPT PROPERTY

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

Now comes your petitioner, David Ciphers Dudley, the bankrupt in the above entitled proceeding, and petitions for review of an order made and entered on the 21st day of March, 1947, entitled "Findings of Fact, Conclusions of Law and Order re Exempt Property," and respectfully shows:

I.

That your petitioner is the bankrupt and is the party in interest in respect to the facts found and the order being reviewed herein, and is adversely affected by said order. That George T. Goggin, as trustee for petitioner's estate in the above entitled matter, is the other party in interest in respect to said order reviewed herein.

II.

That the Referee erred in finding under paragraph I, line 17, ". . . and the court finds that the said bankrupt in so converting [34] non-exempt assets into those which the laws of the State of California declared exempt acted in bad faith with the corrupt design and intent to cheat and defraud his creditors," in that the evidence shows that the bankrupt had not previously filed a declaration of homestead and that the claiming of an exemption given by the state law does not constitute bad faith or corrupt design, nor does it cheat or defraud creditors.

III.

The Referee erred in making the following conclusion of law: ". . . that said conversion of assets was fraud-

ulent as to creditors under Section 70 of the Bankruptcy Act, and that the trustee's return of exempt property in which he denied exemption to said Building and Loan stock should be approved," in that the purchase of building and loan shares in the bankrupt's name was not fraudulent as to creditors, and the bankrupt was and is entitled to the exemptions given by California statute and it was the duty of the trustee and the referee to allow the same as provided by the Bankruptcy Act.

IV.

The Referee erred in finding that the trustee was vested with title to property transferred by the bankrupt in fraud of his creditors whether under Section 20a of the Act or otherwise, and further finding that the trustee is entitled to recover the same, in that title to exempt property is never vested in the trustee and the changing of cash into shares registered in the name of the bankrupt is not a fraudulent transfer.

V.

The Referee erred in making the conclusion of law set forth in paragraph III as follows:

"The court concludes that the trustee is now the owner of said shares of stock and entitled to the custody and control thereof."

in that title to exempt property never passes to the trustee and [35] remains in the bankrupt.

VI.

The Referee erred in making the following order:

"Upon the foregoing Findings of Fact and Conclusions of Law it is ordered that the trustee's return of exempt property filed herein be, and the same hereby is, approved."

in that the bankrupt is entitled to have allowed as exempt all property exempt from the claim of creditors under California statute.

Wherefore, petitioner, feeling aggrieved because of the order heretofore referred to, and the findings and conclusions of law in respect thereto, prays that said findings of fact, conclusions of law and order be reviewed as provided by Section 39-c of the Bankruptcy Act as amended; that upon said review said order be reversed and annulled and that it be adjudged that your petitioner is entitled to have and own as exempt property, ten (10) shares of the Hollywood Building & Loan Association of the value of One Thousand Dollars (\$1,000.00), and that your petitioner be granted such other and further relief as is proper in the premises.

That the Referee prepare his certificate on review and add thereto the following:

1. Page 13 of Schedule B-5, showing the property claimed exempt by the bankrupt.
2. The trustee's return of exempt property.
3. A statement of the evidence offered on the hearing on said exempt property or the reporter's transcript in respect thereto.
4. Findings of fact, conclusions of law and order in respect to exempt property, dated March 21, 1947.
5. This petition for review.

Respectfully submitted,

DAVID CIPHERS DUDLEY, Bankrupt
Petitioner

COBB & UTLEY

By Francis B. Cobb

Attorneys for Bankrupt [36]

[Verified.] [37]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 31, 1947. Hugh L. Dickson,
Referee.

[Endorsed]: Filed May 23, 1947. Edmund L. Smith,
Clerk. [38]

[Title of District Court and Cause]

NOTICE OF HEARING OF REFEREE'S
CERTIFICATE ON REVIEW

To: Messrs. Craig & Weller, Attorneys for Trustee
Messrs. Cobb & Utley, Attorneys for Bankrupt

You, and each of you, will please take notice that on the 14th day of July, 1947, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, a hearing will be had before the Honorable Leon R. Yankwich, in his court room in the Federal Building, in Los Angeles, California, on the Referee's Certificate on Review, filed with the Clerk of the above entitled Court on the 23rd day of May, 1947.

Dated this 27th day of June, 1947.

EDMUND L. SMITH

Clerk U. S. District Court

[Endorsed]: Filed Jun. 27, 1947. Edmund L. Smith,
Clerk. [39]

[Title of District Court and Cause]

OPINION ON PETITION FOR REVIEW

Appearances:

For the Bankrupt: Cobb & Utley, Los Angeles, California.

For the Trustee: Craig & Weller, Los Angeles, California. [40]

Yankwich, District Judge—

The Bankruptcy Act of 1938 recognizes exemptions to which bankrupts are entitled by state laws and requires them to be claimed.(1) The duty of the Trustee to set apart the exempt property is also prescribed by the Act.(2) The effect of these provisions is that the right to exemptions, their nature and amount, are governed strictly by state laws, and the decisions of state courts interpreting them.(3) The law of California is very generous in the matter of exemptions. The exemptions are varied and numerous.(4) Exemption statutes are not only liberally construed, but “are generally subject to the most liberal construction which the courts could possibly give them.”(5) The courts of California have been most liberal in interpreting such statutes. They have taken the view that their object is to put a protective guard around the debtor’s property for his protection and that of his family, And because the exemption flows from the nature of the property and not from any claim of exemption,(6) the courts have protected it against attachment and execution,(7) against a claim for unpaid alimony,(8) and even against a waiver in advance by the debtor.(9)

The problem involved in this review must be approached in the light of these facts. The petitioner was adjudicated

a bankrupt on January 11, 1947, on a voluntary petition. In his schedules, he claimed as exempt ten shares of stock in the Hollywood Building & Loan Association, of the value of One Thousand Dollars (\$1000.00), under the Bankruptcy Act and the California Statute.(10) On February 20, 1947, the Trustee filed [41] a report of exempt property in which he denied the exemption. The bankrupt filed objections to the report. After a hearing, the Referee, on March 31, 1947, made an Order approving the Trustee's report. Factually, the conclusion reached by the Referee was based on the fact that the stock was purchased about a week before the adjudication, at a time when the bankrupt was "heavily in debt and clearly insolvent." This is a petition to review the Order. The applicable California Code section, which is very brief, exempts:

"690.21. (Same: Shares in Building and Loan Association.) Shares of stock in any building and loan association to the value of one thousand dollars."

Legally, the Referee grounded his decision on an opinion of one of our former Referees, Earl E. Moss, interpreting this section.(11) In it, Referee Moss held that a purchase of such stock while insolvent, immediately prior to bankruptcy, was a fraud on the creditors.

I do not have before me the evidence upon which the Trustee in that case based his denial of exemption. The opinion of the Referee would seem to indicate that the purchase was a part of a scheme on the part of the bankrupt to divert the sum of \$4000, which he received shortly before he signed his petition, of which \$1000 was applied to the purchase of the stock. Counsel for the Trustee in the present case base their position entirely,—as did the

Referee,—upon this opinion. [42] In fact, their brief merely urges us to read the cases upon which Referee Moss bases his decision. We have done so. And our conclusion is that whatever particular facts may have justified the Trustee and, later, the Referee in finding that a fraudulent scheme was in effect at the time of this transfer, the opinion, insofar as it holds that the acquisition of such exempt property with non-exempt funds by an insolvent debtor is, ipso facto, fraudulent, is unsound and should not be followed. For, if it were, the entire law of exemptions would be destroyed, and every trustee could invalidate any acquisition of exempt property within the four-months period prior to adjudication.(12) It is to be borne in mind that our Circuit Court of Appeals has held that the effect of the exemption of property under state statutes is that the property does not pass to the trustee and is “not subject to administration by the bankruptcy court.”(13)

An analysis of the opinion on which the claim of the Trustee is based leads to the conclusion that the Referee relied solely on cases in which the courts were satisfied that the acquisition of exempt property was a part of a scheme to divert non-exempt funds to exempt property, under circumstances which constituted actual fraud.(14) But cases in which the sole question involved was whether mere diversion by an insolvent debtor, without actual fraud, led to different conclusions. We find, for instance, that a chattel mortgage given to secure a creditor within the four-months period, and which, under the laws of California, was exempt from execution, was sustained against the claim of the Trustee.(15) More recently, our [43] Circuit Court of Appeals protected a

homestead against the claim of fraud of the Trustee.(16) In that case, the court held that the insolvency of the debtor at the time was immaterial. Among the cases it followed, was a leading California case,—Yager v. Yager.(17) That case has a very terse statement of the approach of the law when it comes to recognizing property such as homestead or other exempt property which the law seeks to protect against creditors. And it determines unequivocally that the doctrine applicable to fraudulent conveyances does not apply to exemptions of this type. We quote:

“A declaration of homestead may be filed during the pendency of litigation, at any time before the judgment has become a lien upon the property. It may be filed subsequent to the rendition of the judgment. (*Beaton v. Reid*, 111 Cal. 484 (44 Pac. 167); *Simonson v. Burr*, 121 Cal. 582 (54 Pac. 87); *Eby v. Foster*, 61 Cal. 282.) It will defeat an existing attachment lien. (*Lucci v. United Credit & Collection Co.*, 220 Cal. 492 (31 Pac. (2d) 369); *Jacobson v. Pope & Talbot*, 214 Cal. 758 (7 Pac. (2d) 1017).) It may be filed after levy of execution, and provided there is not a valid and subsisting judgment lien on the property, it is not subject to execution sale except upon proceedings had under sections 1245-1259 of the Civil Code, for reaching the excess in value above the homestead exemption of \$5000. [44] (*Beaton v. Reid*, *supra*.) The very purpose of the homestead law is to protect the property from existing debts. (*Gray v. Brunold*, 140 Cal. 615, 621, (74 Pac. 303).) The doctrine bearing on conveyances to delay and defraud creditors has no applica-

tion to the creation of a homestead." (Lucci v. United Credit & Collection Co., *supra*; Simonson v. Burr, *supra*; 13 Cal. Jur. 477.)" (Emphasis added.)

Remington states:

"Whether non-exempt property can be converted into exempt property on the eve of bankruptcy must be determined by local law."(18)

And where the exemption by state law is absolute and without any limitation as to time, or other restrictive conditions, the bankruptcy court, bound as it is to follow it, will apply the same rule, regardless of any provisions in the bankruptcy law relating to preferences.

As far back as 1903, our Circuit Court of Appeals determined that money used in the purchase of property while insolvent and on which a declaration of homestead was filed between the date on which a petition for involuntary bankruptcy was filed against him and the date of adjudication was exempt in bankruptcy. We quote the words of Circuit Judge Gilbert:

"The bankruptcy act provides that the allowance of exemption prescribed by state laws shall not be affected. The Constitution and Statutes of [45] California, therefore, as construed by the decisions of the courts of that state, must, independently of other authority, control our decision in this case. In *Randall v. Buffington*, *supra*, it was held that there is no rule of the law which prevents a debtor in insolvent circumstances from using the money which he has to pay off a mortgage on his homestead. In *Fitzell v. Leaky*, *supra*, the court said:

'It has never been held that a homestead was invalidated because the declarant was in debt, or declared the homestead to protect it from existing debts * * * The law authorizes a debtor to erect a barrier around the home over which the sheriff, although armed with final processes under such a judgment, cannot pass.. With the policy of the law or the abstract morality of a transaction, we have nothing to do. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead.'"(19)
(Emphasis added.)

Other courts have made similar rulings.

Thus, the Eighth Circuit Court of Appeals has held that, in the absence of extrinsic fraud, the conversion by an insolvent of non-exempt property into exempt property is permitted.(20) [46]

Quite recently, the Sixth Circuit Court of Appeals, under a state statute exempting the proceeds of a life insurance policy, ruled that payments of premiums on such life insurance, while insolvent, should be respected in bankruptcy court.(21)

In a case which came before me in 1937, and in which an adjudication was made on November 26, 1935, I sustained a declaration of homestead recorded by the bankrupt on October 14, 1935, on real property acquired by him and his wife and owned by them in joint tenancy. I ruled that, while the homestead declaration was ineffective as to the interest of the wife because of the nature of joint tenancy under the law of California, nevertheless, it was "valid to the extent of his own interest in the prop-

erty.”(22) So doing, I held that the Referee was right in setting aside the property as exempt and in sustaining the objections of the bankrupt to the Trustee’s report of exempt property which had denied the exemption.

The rulings in these cases are logical. They flow directly from the nature of the exemptions prescribed by the state codes. If the mere acquisition of exempt property while insolvent were sufficient ground to destroy the exemption, the acquisition of any such property, within the four-months’ period, could be nullified, and the protection which the state law gives to a debtor, even against the solemn money judgment of a court, would be denied him against creditors in bankruptcy. An anomalous condition would thus be created. A judgment creditor or a wife who has an alimony decree has a stronger claim on a debtor than a creditor who has advanced him money in a business [47] venture which failed. And if the benefit of an exemption can be claimed against such creditors, it should not be denied as to the ordinary creditor in bankruptcy. To do otherwise would destroy the exemption altogether and would result in the bankruptcy court substituting its own judgment as to what should be exempt for the solemn statutory enactments of the state of the bankrupt’s residence, which, as fully appears from the foregoing discussion,(23) are binding on us.

The matter is well put by the Circuit Court of Appeals for the Eighth Circuit in a leading case(24) :

“There is no claim of fraud in the severance of these sums of money into individual ownership, except that it took from partnership creditors a fund to which they could have resorted if it had remained partnership assets until placed in the custody of the

law, and placed it among the individual assets, where it was subject to a claim of exemption, and that this was done for that purpose, and when it was known to the partners that they and the firm were insolvent and in anticipation of early proceedings in bankruptcy. It is well settled that it is not a fraudulent act by an individual who knows he is insolvent to convert a part of his property which is not exempt into property which is exempt for the purpose of claiming his exemptions therein, [48] and of thereby placing it out of the reach of his creditors. *Flask v. Tindall*, 39 Ark. 571; *In re Irvin*, 120 Fed. 733, 57 C. C. A. 147; *Huenergardt v. John S. Brittain Dry Goods Co.*, 116 Fed. 31, 53 C. C. A. 505; *First National Bank v. Glass*, 79 Fed. 706, 25 C. C. A. 151; *In re Wilson*, 123 Fed. 20, 59 C. C. A. 100; *In re Thompson (D. C.)*, 140 Fed. 257; *O'Donnell v. Segar*, 25 Mich. 367; *Randall v. Buffington*, 10 Cal. 491; *Cipperly v. Rhodes*, 53 Ill. 346; *Meigs v. Dibble*, 73 Mich. 101, 40 N. W. 935; *Jacoby v. Parkland Distilling Co.*, 41 Minn. 227, 43 N. W. 52; *Palmer v. Hawes*, 80 Wis. 474, 50 N. W. 341; *Thomp. on Homesteads & Ex.*, Secs. 305-309.

“This has become an established principle, because the statute granting exemptions have made no such exceptions, and because the policy of such statutes is to favor the debtors, at the expense of the creditors, in the limited amounts allowed to them, by preventing the forced loss of the home and of the necessities of subsistence, and because such statutes are construed liberally in favor of the exemption.” (Emphasis added.)

In sum: the California statute places no time limit on the exemption of building and loan stock to the value of one thousand dollars. It does not say when building and loan stock must be acquired in order to be exempt.(25) Nor does it [49] say that the person shall be solvent at the time of acquisition. To sustain the Referee in this case, we would have to impose a time limit and make solvency a condition precedent to exemption. This would mean reading into the state statute restrictions which are not there. And this we cannot and should not do. And, as there is no showing of actual fraud, the stock is immune against the creditors and never passed to the trustee.

The Order of the Referee, dated March 31, 1937, approving the Trustee's report of exempt property is, therefore, reversed with direction to enter a proper order setting apart the stock as exempt.

Dated this 4th day of August, 1947.

LEON R. YANKWICH

Judge [50]

NOTES TO TEXT

1. Bankruptcy Act, Sections 6, 7(a)(8), 11 U. S. C. A. 25(a)(8).
2. Bankruptcy Act, Section 47(a)(6), 11 U. S. C. A. 75(a)(6).
3. Bankruptcy Act, Section 6, 11 U. S. C. A. 24; 8 C. J. S. Bankruptcy, Sec. 494; Holden v. Stratton, 1905, 198 U. S. 202; White v. Stump, 1924, 266 U. S. 310; Clark v. Nirebaum et al., 1925, 5 Cir., 8 F. (2) 451; In re Miller, 1934, 8 Cir., 74 F. (2) 86; Turner v. Bovee, 1937, 9 Cir., 92 F. (2) 791;

- Doethlaff v. Penn. Mutual Life Ins. Co., 1941, 6 Cir., 117 F. (2) 582.
4. California Code of Civil Procedure, Sec. 690, 690.1 to 690.23 inclusive.
 5. Dean v. Shephard, 1928, 9 Cir., 26 F. (2) 461, 461; and see, Hills v. Joseph, 1916, 9 Cir., 229 Fed. 865; see also my opinions in re Fox, 1936, D. C. Cal., 16 Fed. Sup. 320; In re Sterling, D. C. Cal., 1937, 20 Fed. Sup. 924.
 6. Williamson v. Monroe, 1917, 174 C. 462.
 7. North British & Mercantile Co. v. Ingalls, 1930, 109 C. A. 161; Yager v. Yager, 1936, 7 C. (2) 213; Montgomery v. Bullock, 1938, 11 C. (2) 58.
 8. In re Smallbone, 1940, 16 C. (2) 632.
 9. Industrial Loan & Investment Co. v. Superior Court, 1922, 189 C. 546.
 10. Bankruptcy Act of 1938, Sec. 6, 11 U. S. C. A. 24; California Code of Civil Procedure, 690.21.
 11. In re Gorman, 1929, 14 A. B. R. (NS) 145.
 12. Bankruptcy Act of 1938, Sec. 3(b); and see my recent [51] opinion in re Rand Mining Company, 1947, D. C. Cal., 71 Fed. Sup. 724.
 13. 8 C. J. S., Bankruptcy, Sec. 504; Lockwood v. Exchange Bank, 1903, 190 U. S. 294; Baumbaugh v. Los Angeles Morris Plant Co., 1929, 9 Cir., 30 F. (2) 816; and see, Ingram v. Wilson, 1903, 8 Cir., 125 Fed. 913; In re Bitner, 1918, 7 Cir., 255 Fed. 48; Clark v. Nirenbaum, 1925, 5 Cir., 8 F. (2) 451; Duffy v. Tegeler, 1927, 8 Cir., 19 F. (2) 305; Turner v. Bovee, 1937, 9 Cir., 92 F. (2) 791; Myers v. Matley, 1942, 9 Cir., 130 F. (2) 775; Stein v. Bos-

- tian, 1943, 133 F. (2) 586, 589; *Negin v. Solomon*, 1945, 2 Cir., 151 F. (2) 112.
14. *In re Gerber*, 1911, 9 Cir., 186 Fed. 693; *Kangas v. Robey*, 1920, 8 Cir., 264 Fed. 92, are illustrative of the cases on which the Gorman opinion is based.
 15. *Baumbaugh v. Los Angeles Morris Plant*, 1929, 9 Cir., 30 F. (2) 816.
 16. *Turnbeaugh v. Santos*, 1944, 9 Cir., 146 F. (2) 168.
 17. 7 C. (2) 213, at page 217.
 18. 3 Remington on Bankruptcy, 4th Ed., Section 1278.
 19. *In re Wilson*, 1903, 9 Cir., 123 Fed. 20, 22.
 20. *Forsberg v. Security State Bank*, 1926, 15 F. (2) 499. We are not impressed by the manner in which the Referee in the Gorman case attempts to distinguish this case. Nor can we follow the "extra-judicial" reasonings which counsel for the Trustee in this case urges as grounds for disregarding it, based on his residence in the state under [52] the law of which the case arose. The case needs no gloss. Its teaching is plain enough. It says that the conversion by an insolvent of non-exempt property into exempt, in the absence of actual fraud, does not warrant a denial of the exemption in bankruptcy.
 21. *Doethlaff v. Penn Mutual Life Insurance Co.*, 1941, 6 Cir., 117 F. (2) 582. Compare, *Schwartz v. Coen*, 1942, 2 Cir., 131 F. (2) 879. An examination of the cases cited by Remington under the section to which we have just referred in the text (See Footnote 18) brings out the significant fact that, except in states where restrictions are placed on certain exemptions, the only opinion supporting the proposition that the transfer of exempt property, in the absence

of actual fraud, is, by the very fact, invalid is the Referee's opinion which we are discussing.

22. In re Sterling, 1937, D. C. Cal., 20 Fed. Sup. 924, 927.
23. See cases in Footnotes 3 and 19.
24. Crawford v. Sternberg, 1915, 8 Cir., 200 Fed. 73, 76.
25. Compare Myers v. Matley, 1942, 9 Cir., 130 F. (2) 775, 777-778; Myers v. Matley, 1943, 318 U. S. 622, 625-628.

[Endorsed]: Filed Aug. 4, 1947. Edmund L. Smith, Clerk. [53]

[Title of District Court and Cause]

Honorable Leon R. Yankwich, Judge

ORDER ON PETITION FOR REVIEW

The petition of the bankrupt to review the Order of the Referee, dated March 31, 1947, heretofore argued and submitted, is now decided as follows:

Upon the grounds set forth in the opinion filed herewith, the Order of the Referee, dated March 31, 1947, approving the Trustee's Report of Exempt Property is reversed, with direction to enter the proper order setting apart the building and loan stock to the value of one thousand (\$1000.00) dollars as exempt.

Dated this 4th day of August, 1947.

[Endorsed]: Filed Aug. 4, 1947. Edmund L. Smith, Clerk. [54]

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 44,706-Y

In the Matter of DAVID CIPHERS DUDLEY, dba
DAVE DUDLEY, and HOLLYWOOD LEATHER
GOODS MFG. CO.,

Bankrupt.

JUDGMENT ON ORDER ON PETITION FOR
REVIEW

The petition for review of the Referee's Order dated March 21, 1947 approving the Trustee's report of exempt property coming on for hearing pursuant to Notice on July 14, 1947 at 10 o'clock A. M. on said date, and the petitioner for review and the bankrupt appearing by his attorneys, Messrs. Cobb & Utley, Francis B. Cobb of counsel, and the Trustee appearing by his attorneys, Messrs. Craig & Weller and Russell B. Seymour, Thomas S. Tobin of counsel, and memoranda having been submitted by both parties and the Court having taken the matter under submission and having on August 4, 1947 made a Minute Order reversing the Order of Referee Hugh L. Dickson dated March 21, 1947, with directions, on motion of Messrs. Cobb & Utley, attorneys for the bankrupt and petitioner on review, It Is

Ordered, Adjudged and Decreed that the Order of the Referee, Hugh L. Dickson, dated March 21, 1947, be, and the same hereby is reversed and said Referee is directed to enter an Order [55] setting apart the Building & Loan stock of the value of \$1,000.00 as exempt as claimed by the bankrupt.

Done at Los Angeles in the Southern District of California, this 14th day of August, 1947.

LEON R. YANKWICH

United States District Judge

Approved as to Form Under Rule

FRANCIS B. COBB

THOMAS S. TOBIN

Judgment entered Aug. 14, 1947. Docketed Aug. 14, 1947. C. O. Book 44, page 685. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Filed Aug. 14, 1947. Edmund L. Smith, Clerk. [56]

[Title of District Court and Cause]

NOTICE OF APPEAL

To David Ciphers Dudley, Bankrupt herein, and Messrs. Cobb & Utley, his Attorneys:

You Will Please Take Notice that the undersigned, George T. Goggin, Trustee in Bankruptcy for the above named bankrupt estate, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order and Judgment of Honorable Leon R. Yankwich entered on the 14th day of August, 1947, wherein the Order of Referee in Bankruptcy, Hugh L. Dickson, dated March 21, 1947, approving the Trustee's report of exempt property was reversed with directions to enter the proper Order setting apart the Building & Loan stock

of the value of \$1,000.00 as exempt, and from the whole thereof.

Dated: August 18th, 1947.

CRAIG & WELLER

RUSSELL B. SEYMOUR

THOMAS S. TOBIN

By Thomas S. Tobin

Attorneys for Trustee [57]

Service of the within Notice of Appeal is hereby admitted this 21 day of Aug., 1947. Cobb & Utley, by Ernest R. Utley, Attorneys for Bankrupt.

[Endorsed]: Filed Aug. 21, 1947. Edmund L. Smith, Clerk. [58]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 64 inclusive contain full, true and correct copies of Petition and Schedules; Orders of Adjudication and of General Reference; Bond of Trustee with Approval of Referee thereon; Referee's Certificate on Review; Trustee's Report of Exempt Property; Objections to Trustee's Report of Exempt Property; Memorandum of Opinion; Findings of Fact, Conclusions of Law and Order re Exempt Property; Petition for Review of Referee's Findings of Fact, Conclusions of Law and Order re Exempt Property; Notice of Hearing of Referee's

Certificate on Review; Opinion on Petition for Review; Order on Petition for Review; Judgment on Order on Petition for Review; Notice of Appeal; Statement of Points Upon Which Appellant Intends to Rely on Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$16.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 25 day of September, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Endorsed]: No. 11745. United States Circuit Court of Appeals for the Ninth Circuit. George T. Goggin, Trustee in Bankruptcy of the Estate of David Ciphers Dudley, doing business as Dave Dudley and Hollywood Leather Goods Mfg. Co., Bankrupt, Appellant, vs. David Ciphers Dudley, doing business as Dave Dudley and Hollywood Leather Goods Mfg. Co., Bankrupt, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 29, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11745

GEORGE T. GOGGIN, Trustee, et al.,

Appellant,

vs.

DAVID CIPHERS DUDLEY, et al.,

Appellee.

POINTS ON WHICH APPELLANT INTENDS TO
RELY ON APPEAL

The undersigned, Attorneys for Appellant and Trustee, hereby designate the following points on which they intend to rely on appeal:

Point 1: That the District Court erred in reversing the Order of the Referee declining to sustain the Objections to the Trustee's Return of Exempt Property, and approving the same.

Point 2: That the District Court erred in not affirming and adopting the Referee's Findings of Fact, Conclusions of Law and Order re Exempt Property dated March 21, 1947.

Point 3: That the District Court erred in making an Order directing that an Order be made by the Referee setting apart the Building & Loan stock of the value of \$1,000.00 claimed by the bankrupt as exempt.

Point 4: That the District Court erred in holding that an insolvent bankrupt within a few days prior to the filing of his petition, and while insolvent and at a time when his petition in bankruptcy is being prepared, and while in contemplation of bankruptcy, has a right

as against creditors to convert non-exempt assets into assets which are exempt when such conversion is made in bad faith and with the corrupt design and intent on the part of the bankrupt to cheat and defraud his creditors.

Wherefore, appellant prays that the Judgment and Order of the District Court be reversed and that the Order of the Referee dated March 21, 1947, be approved and affirmed.

CRAIG & WELLER

By Thomas S. Tobin

Attorneys for Appellant and Trustee

[Endorsed]: Filed Nov. 10, 1947. Paul P. O'Brien,
Clerk.

No. 11745.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
of David Ciphers Dudley, doing business as Dave
Dudley and Hollywood Leather Goods Mfg. Co., Bank-
rupt,

Appellant,

vs.

DAVID CIPHERS DUDLEY, doing business as Dave Dudley
and Hollywood Leather Goods Mfg. Co., Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANT.

FRANK C. WELLER,

THOMAS S. TOBIN,

111 West Seventh Street, Los Angeles 14,

Attorneys for Appellant.

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No. 11745.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
of David Ciphers Dudley, doing business as Dave
Dudley and Hollywood Leather Goods Mfg. Co., Bank-
rupt,

Appellant,

vs.

DAVID CIPHERS DUDLEY, doing business as Dave Dudley
and Hollywood Leather Goods Mfg. Co., Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANT.

Statement of Jurisdiction.

The jurisdiction of the United States District Court in the voluntary proceeding of the bankrupt was invoked under the provisions of Section 2-a, Subdivision 1, of the National Bankruptcy Act and amendments thereto (11 U. S. C. A., Sec. 11, Subdivision 1).

Jurisdiction of the District Court on review was invoked under the provisions of Section 2-a, Subdivision 10 of the National Bankruptcy Act (11 U. S. C. A., Sec. 11, Subdivision 10). The jurisdiction of the Referee to determine the claim of the bankrupt to his exemptions was invoked under the provisions of Section 2-a, Subdivi-

sion 11 (11 U. S. C. A., Sub-section 11). The jurisdiction of this court on appeal was invoked under the provisions of Section 24-a of the National Bankruptcy Act (11 U. S. C. A., Sec. 48-a).

Opinion Below.

The Opinion of the Referee in Bankruptcy is found at Transcript, page 41. His Findings of Fact and Conclusions of Law amplifying this Opinion are found at Transcript, pages 42 to 44. The Opinion of the District Judge on Petition for Review is found at Transcript, pages 49 to 60, inclusive.

Statutes Involved.

Bankruptcy Act, Section 6 (11 U. S. C. A., Sec. 24). Code of Civil Procedure of California, Secs. 690 and 690.21. Bankruptcy Act, Sec. 67-d-2, Subdivision d (11 U. S. C. A., Sec. 107-d-2-d). Bankruptcy Act, Sec. 70-a, Subdivisions 4 and 5 (11 U. S. C. A., Sec. 110-a, Subdivisions 4 and 5).

Points Upon Which Appellant Intends to Rely.

The points upon which the appellants intend to rely are closely related and follow:

Point 1: That the District Court erred in reversing the Order of the Referee declining to sustain the Objections to the Trustee's Return of Exempt Property, and approving the same.

Point 2: That the District Court erred in not affirming and adopting the Referee's Findings of Fact, Conclusions of Law and Order *re* Exempt Property dated March 21, 1947.

Point 3: That the District Court erred in making an Order directing that an Order be made by the Referee setting apart the Building & Loan stock of the value of \$1,000.00 claimed by the bankrupt as exempt.

Point 4: That the District Court erred in holding that an insolvent bankrupt within a few days prior to the filing of his petition, and while insolvent and at a time when his petition in bankruptcy is being prepared, and while in contemplation of bankruptcy, has a right as against creditors to convert non-exempt assets into assets which are exempt when such conversion is made in bad faith and with the corrupt design and intent on the part of the bankrupt to cheat and defraud his creditors.

Statement of the Case.

The bankrupt, David Ciphers Dudley, was a manufacturer of leather goods in Hollywood, County of Los Angeles and State of California [Tr. p. 2]. He filed his voluntary petition in the District Court of the United States for the Southern District of California praying to be adjudged a bankrupt. The petition was verified on January 10, 1947 [Tr. p. 21] and was filed on January 11, 1947. The bankrupt's liabilities taken at his own figures totaled \$38,372.49 and his assets taken at his own valuation amounted to the sum of \$30,082.13, including property claimed by him as exempt [Tr. pp. 4 and 5]. Among the liabilities it is interesting to note are included large tax claims for excise taxes, withholding taxes and so forth, due the United States Government in the sum of \$8,043.48, taxes due State of California amounting to \$835.24, and the City of Los Angeles, \$20,082.00. The bankrupt also owed wage claims to employees totaling \$839.65 [Tr. pp. 5, 6 and 7].

Preparing to go through bankruptcy the bankrupt discovered that he had a little over \$1,000.00 in cash on hand. We note that he schedules only \$40.00 cash on hand in his bankruptcy schedules [Tr. p. 22]. While his schedules in bankruptcy were being prepared the bankrupt, learning that shares in building and loan associations in the State of California were exempt from execution and attachment under the provisions of Section 690.21 of the Code of Civil Procedure of California, and that there was no provision in the exemption laws of California whereby the cash which he had on hand (probably the sum of \$1,540.00) could be exempted to him and withheld from his creditors and taxing bodies, purchased \$1,000.00 worth of building and loan stock, scheduled it in his schedules [Tr. p. 28], paid his attorney's fees in the sum of \$500.00 and claimed the building and loan stock as exempt.

At the first meeting of creditors he was examined regarding these transactions and the facts brought out. The trustee declined to set aside the building and loan stock as exempt and objections were filed to the trustee's report of exempt property [Tr. pp. 39 and 40].

A hearing was had thereon and at the time of the hearing it was stipulated between the attorneys for the bankrupt and the attorneys for the trustee that the testimony taken at the examination of the bankrupt previously held could be considered by the Referee in determining the issues. The matter was submitted on the testimony adduced at the prior hearing and the Referee, who had

had an opportunity to study the bankrupt at first hand, to judge his attitude and demeanor on the stand and the honesty or bad faith of his intentions in converting this non-exempt cash into building and loan stock, held that the bankrupt had not acted in good faith but with fraudulent intent and sustained the trustee in refusing to set aside this building and loan stock as exempt, in view of all of the circumstances surrounding its acquisition [See Referee's Certificate on Review, Tr. pp. 36 to 38]. The bankrupt filed his petition for review with the District Judge and the matter went up on review based on the Referee's Certificate, his Memorandum Opinion and Findings of Fact and Conclusions of Law. The testimony which had been adduced at the previous examination of the bankrupt was not written up and was not before the District Court. The only record before the District Judge was based on the Referee's statement of evidence and his Findings of Fact, Conclusions of Law and Order. In the face of the Referee's express finding that the bankrupt had acted in bad faith in acquiring these shares of building and loan stock while his petition in bankruptcy was being prepared, and that he had a corrupt design and intent to cheat and defraud his creditors [See Referee's Findings of Fact, Tr. p. 43], the District Judge reversed the Order of the Referee and entered an Order directing that the building and loan stock be set aside as exempt and rendered judgment accordingly [See Tr. pp. 60 to 62].

The trustee has appealed from the Order and Judgment of the District Court reversing the Referee's Order.

ARGUMENT, POINTS AND AUTHORITIES.

The District Court Erred in Reversing the Order of the Referee Declining to Sustain the Objections to the Trustee's Return of Exempt Property and Approving the Same.

The District Court Erred in Not Affirming and Adopting the Referee's Findings of Fact, Conclusions of Law and Order Re Exempt Property Dated March 21, 1947.

In discussing the above errors we wish to point out to the court that there was no transcript of testimony taken to the District Court on the review and the review was predicated on the statement of evidence and Referee's Certificate. As heretofore pointed out, a Stipulation was entered into at the time of the hearing on the trustee's return of exempt property; that the Referee could take into consideration the testimony adduced at a prior examination of the bankrupt where the Referee had had an opportunity to see the bankrupt face to face and to consider his attitude and demeanor. The findings of the Referee were based on this examination which was not before the District Judge and the reversal was based on a cold record. The Referee was satisfied from the bankrupt's attitude that his acquisition of this building and loan stock was actually fraudulent and that more was here than a mere belated protection of a home which the bankrupt was already occupying with his family.

The authorities are conflicting on the question of whether or not the conversion of non-exempt assets into exemptions shortly prior to bankruptcy constitutes a transfer with intent to hinder, delay or defraud creditors,

but it will be noted that the decisions in favor of the exemption are qualified where the conversion is not made in bad faith. In the case at bar the Referee found that the bankrupt had acted in bad faith in converting this non-exempt cash into exempt building and loan securities, and we submit that that finding takes this case out of the qualification of the authorities favorable to the exemption.

In *Kangas v. Robie*, 264 Fed. 92, the United States Circuit Court of Appeals for the Eighth Circuit, said:

“The situation which petitioner presents to us is a confession of bad faith on his part, that the purpose with which he took title to the property which he now claims as exempt was to defraud his creditors, and we must decline to give it our approval. We are persuaded that the Supreme Court of Minnesota would also refuse to approve such conduct and make it a basis on which to allow the exemption. That court, in *Esty v. Cummings*, 78 N. W. 242, 244, has expressed itself in this language:

“‘While the homestead right is a valuable one, and the protecting arm of the law should be carefully used in guarding it, it was never intended, and it should never be permitted, to operate as a vehicle for fraud and rank injustice.’ See also *Small v. Anderson*, 139 Minn. 292, 166 N. W. 340.

“This is in accord with what we held in *Huenergardt v. Dry Goods Co.*, 116 Fed. 31 and *Amundson v. Folsom*, 219 Fed. 122. The Court of Bankruptcy did not err in matter of law. The petition must be dismissed at petitioner’s cost.”

In the Matter of Gerber, 186 Fed. 693, 26 A. B. R. 608, this Court speaking through Judge Ross, said:

“While it is well-established law that exemptions in behalf of unfortunate debtors are to be liberally construed in furtherance of the object of such statutes, it should never be forgotten that courts have not the power to legislate, and can no more add an exemption not fairly within the statute than they can take from the statute. So also must it be remembered that courts of bankruptcy proceed upon equitable principles, and should no more sustain a positive fraud than would a court of equity. In respect to this homestead claim, both the referee and the District Court expressly recognized its fraudulent character. In view of the facts found, it is impossible to see how it could have been otherwise. Here was a debtor fully conscious of his bankruptcy, strenuously opposing those of his creditors who were seeking his adjudication as a bankrupt, the while disposing of and secreting his cash, and finally consenting to such an adjudication provided the creditors would dismiss their then pending petition for his adjudication as a bankrupt and procure other creditors to file a new one; his obvious purpose, made manifest by his action, being to put, in the interim, the money to which his creditors were justly entitled into property upon which he could and did forthwith declare a homestead. Surely no court acting upon equitable principles should sustain such a transaction.”

In the Matter of Levinson, 295 Fed. 736, 1A. B. R. (N. S.) 496, the District Court speaking through the

late Judge William P. James in overruling the contention of a bankrupt seeking to exempt certain policies of insurance purchased by him on the eve of bankruptcy, said:

“It may be said that it appears beyond even a reasonable doubt that all of the money which went to pay insurance premiums was property of the bankrupt’s estate and was property which the trustee had the right to demand and receive possession of. It cannot be said that the policy of insurance may be saved to the bankrupt under the specious claim of exemption, for the best conclusion that can be made from the testimony is that the taking out of the insurance and the filing of the petition in bankruptcy was approximately of the same time.”

In the Matter of Majors, 241 Fed. 538, 39 A. B. R. 642, the District Court for the District of Oregon said:

“The local statute relating to exemptions does not, as is the case in other States, grant exemption in money in lieu of property, but only in property in kind. Section 227, Lord’s Oregon Laws. The attempt, therefore, to avail himself of the statute by converting the money into exempt property in anticipation of bankruptcy was a fraud upon the creditors, and it has been so held in this circuit in a case of strong analogy to this. *Freedman Bros. Co. v. Parker* (C. C. A. 9th, Cir.), 186 Fed. 693. (Citing *McGahan v. Anderson* from the Fourth Circuit, 113 Fed. 115, 119.) I am, of course, bound by this authority, which has the further merit of being sound upon principle. It follows that the bankrupt cannot legitimately claim this property as exempt.”

In *Amundson v. Folsom*, 219 Fed. 122, 33 A. B. R. 318, the Circuit Court of Appeals for the Eighth Circuit, said:

“It is too narrow a view to regard each step in the transaction separately and independently. It may be true as argued that creditors of a partnership merely as such have not a lien on partnership assets as distinguished from an equity in their administration, or that the members of an insolvent firm may lawfully sever their relation and one sell his interest in the firm property to the other, or that a debtor in failing circumstances can turn business assets into exempt property and hold it, or that one may lawfully purchase a stock of goods in bulk from another, or, finally, that it is not in itself fraudulent for an insolvent debtor merely to make a preferential transfer or for his creditor to receive it. But all such things, especially when in close consecutive association, are to be considered with what else appears in determining whether the result was the consummation of a preconceived purpose to hinder, delay or defraud creditors. * * * Transactions apparently innocent when separately regarded may take on a different signification when seen in their true connection with others. And it is not always safe to venture a prohibited course on a mosaic of sound but unrelated rules of law.”

In *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. 115, 7 A. B. R. 641, the Circuit Court of Appeals for the Fourth Circuit disallowed a homestead exemption to a bankrupt who had withdrawn money from his business and invested it in a homestead, using the following language:

“The fair deduction from all the evidence in this case tends clearly to prove that at the time he com-

menced the erection of this house he was in a failing condition, if not insolvent. He built this house upon a lot owned by his wife, and afterwards had it conveyed to himself in order that he might have it set apart as a homestead. This is a most potential fact to show that he was shaping his course to protect himself as far as possible from the consequence of bankruptcy, which the evidence tends to show was imminent at that time, for on the 25th day of October following a petition of involuntary bankruptcy was filed against him, and in less than a month he was adjudicated a bankrupt. We deem it unnecessary to discuss the evidence in detail filed in this case, but content ourselves with the conclusions that we have reached based upon all the evidence, more particularly on the evidence of the bankrupt himself."

In the Matter of Boston, 98 Fed. 587, 3 A. B. R. 388, the United States District Court for the District of Nebraska affirmed an Order of the Referee disapproving the conversion of non-exempt property and applying the proceeds thereof on an encumbrance upon property which was exempt without Opinion.

In *Laderburg, Bankrupt, v. Miller, Trustee*, 210 Fed. 614, 31 A. B. R. 335, the Circuit Court of Appeals for the Fourth Circuit in a case where a bankrupt who was in business separated from his stock numerous articles of merchandise valued at \$867.90, together with store fixtures valued at \$145.00 and claimed them exempt under a Virginia Statute which permitted the setting aside of

a homestead in personal property as exempt, using the following language:

“It follows that the debtor cannot by his act of closing his store or separating a part of his shifting stock of merchandise with the view of defeating the rights of the creditor have a homestead in such property. To hold that the Constitution contemplates that such a result could be secured by such a method, would be to make of no effect the constitutional provision that a shifting stock of goods shall not be exempt. * * * Under this rule the Constitution of Virginia cannot be construed to contemplate the annulment of one of its own provisions by allowing a failing debtor to transmute a shifting stock of merchandise not exempt into exempt property by withdrawing it from sale for the purpose of claiming it as an exemption.”

In the lower courts in the case at bar the bankrupt relied heavily on *Forsberg v. Security State Bank of Canova*, 15 Fed. (2d) 499, 8 A. B. R. (N. S.) 794. This case, however, is quite distinguishable from the case at bar. In the first place it was a review of an order denying a bankrupt his discharge on the ground that within four months preceding the filing of this petition he had transferred property consisting of horses, cattle and hogs with the intent to hinder, delay and defraud his creditors, using the proceeds of the sale of the property to purchase certain sheep and other personal property which he later claimed exempt under the Statutes of South Da-

kota. The Referee, sitting Special Master, expressly found at the trial that the transfer was not made with intent to hinder or delay his creditors, and that the objections filed by the objecting creditor had not been sustained. The District Judge overruled the Findings of the Referee and denied the bankrupt his discharge. The Circuit Court of Appeals for the Eighth Circuit reversed the District Judge and ordered the bankrupt discharged. In discussing the case of *Kangas v. Robie*, 264 Fed. 92, cited by the objecting creditor, the Circuit Court of Appeals pointed out that Kangas, the bankrupt, in that case, had ceased making payments on his trade obligations, ceased making daily deposits in the bank until he accumulated \$13,000.00, invested the same in an apartment building and claimed the building exempt as a homestead. In discussing the *Kangas* case the Circuit Court of Appeals said:

“The referee in bankruptcy denied the claimed exemption. He found that there was a fraudulent attempt on the part of Kangas to put the money realized from the collection of his accounts and the sale of merchandise beyond the reach of creditors from whom he received said merchandise on credit. The District Judge found that Kangas ‘set out with the corrupt purpose and design of defrauding his creditors; * * * that he made the purchase, moved into the property, and is now claiming it as a homestead to accomplish that purpose and design.’ The action of the referee was approved.”

Conclusion.

As we have heretofore pointed out, the line of reasoning in the cases holding contrary to the case at bar were cases wherein the Referee as a trier of fact had not found actual fraud on the part of the bankrupt. In the case at bar the Referee found that the bankrupt had acted toward his creditors in bad faith and with a corrupt intent. We submit that the Referee after having heard the bankrupt's testimony directly at his examination, which was stipulated could be considered as the evidence in this case, was in a much better position to judge from the bankrupt's attitude what his intent was than was the District Judge on review, particularly where the testimony of the bankrupt at his previous examination had not been written up, was not certified to the District Court, and the reversal therefore predicated on the Referee's Findings. The exemption laws of California, it is true, are very liberal, but we do not believe it was the intent of the Legislature to permit a debtor to walk off with property worth \$15,000.00 or \$20,000.00 and at the same time permit him to discharge his obligations after manipulating his non-exempt assets as was done here. The Exemption Statutes of California are included in twenty-four subsections of Section 690 of the Code of Civil Procedure. Some of the subsections are limited as to value, for instance, tables, chairs and so forth, maximum, \$200.00, Section 690.1; farming equipment and draft animals, \$1,000.00 and \$200.00 respectively, Section 690.3; poultry valued at \$75.00, Section 690.9; one-half

or all of his earnings within thirty days preceding the levy, dependent on whether or not the debt was incurred for common necessities of life, Section 690.11; stock in building and loan associations of a value of \$1,000.00, Section 690.21. The above personal property exemptions are in addition to the \$7,500.00 homestead now allowed under the laws of the State of California.

The Bankruptcy Court operates on the equity side. We do not believe that a court of equity should countenance a business man or manufacturer, as is the case with this bankrupt, taking money out of his business and investing it in securities on the eve of bankruptcy while his schedules are being prepared and being permitted to claim it as exempt, especially in the face of the Referee's finding of bad faith on the part of the bankrupt.

In considering the holding of the Circuit Court of Appeals for the Eighth Circuit in *Forsberg v. Security State Bank of Canova*, 15 F. (2d) 499, please bear in mind that in that case the bankrupt was faced with a penal statute, Section 14 of the National Bankruptcy Act, which provided for a denial of his discharge if within four months preceding the filing of the petition he had transferred property with the intent and purpose on his part to hinder, delay or defraud his creditors. If the Court sustained the Trustee's contention in that case the bankrupt would have completely forfeited his discharge in so far as all of his debts were concerned. We have no such situation here. Here the Referee merely told the bankrupt that the Bankruptcy Court would not aid him in

permitting him to convert his non-exempt cash into exempt assets by setting the exempt assets aside to him in bankruptcy proceedings. In the *Forsberg* case the bankrupt would have forever lost his discharge as to all of his debts. In the case at bar this bankrupt will have lost nothing. He has merely been told that he cannot affirmatively enrich himself unjustly to the extent of \$1,000.00 where, barring the transmutation of his cash into building and loan stock, the \$1,000.00 would have gone to his creditors. We believe with the late Judge Ross of this Circuit, author of the Opinion *In the Matter of Gerber*, 186 Fed. 693, that Courts of bankruptcy, proceeding upon equitable principles, should no more sustain a positive fraud than would a court of equity.

We respectfully submit that the order and judgment of the District Judge should be reversed and that of Referee Dickson affirmed.

Respectfully submitted,

FRANK C. WELLER,

THOMAS S. TOBIN,

By THOMAS S. TOBIN,

Attorneys for Appellant.

No. 11745

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
of David Ciphers Dudley, doing business as Dave
Dudley and Hollywood Leather Goods Mfg. Co.,
Bankrupt,

Appellant,

vs.

DAVID CIPHERS DUDLEY, doing business as Dave Dudley
and Hollywood Leather Goods Mfg. Co., Bankrupt,

Appellee.

RESPONDENT'S REPLY BRIEF.

COBB & UTLEY.

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DAVID CIPHERS DUDLEY, doing business as Dave Dudley
and Hollywood Leather Goods Mfg. Co., Bankrupt,

Appellee.

RESPONDENT'S REPLY BRIEF.

Respondent's Statement of the Case.

Respondent submits that the evidence and question to be determined is clearly stated by the Referee at Transcript page 36, as follows:

"This evidence showed that prior to his bankruptcy the bankrupt was hopelessly insolvent and contemplated going through bankruptcy for the purpose of discharging his debts. While heavily in debt and clearly insolvent and while preparing his Petition in Bankruptcy to be filed in this court approximately one week before the filing of his voluntary petition the bankrupt acquired building and loan stock of the value of \$1,000.00 for the

purpose of claiming the same as exempt and preventing his creditors from realizing on this clearly non-exempt cash. He claimed the same as exempt together with household goods, furniture and wearing apparel of a value of \$1050.00 and a complete set of hand carving stamps and leather working tools of a value of \$1500.00. The trustee set aside the household goods, furniture and wearing apparel and the complete set of hand carving stamps and leather working tools to the bankrupt as exempt, but refused to set the shares of building and loan stock aside as exempt to the bankrupt.

“The sole question to be determined is whether or not a bankrupt on the eve of bankruptcy and with the intent to withdraw from his bankrupt estate non-exempt cash or other assets, can for that express purpose, purchase exempt property out of his non-exempt assets and have them set aside to him as exempt in defiance of the rights of the rights of his creditors.” (Obviously the last portion of the sentence is an error and should read “in defiance of the rights of his creditors.”)

The Referee drew the conclusion that it constituted fraud on creditors to use \$1,000.00 in cash to purchase property permitted by California statute to be claimed as exempt.

It is clear from his statement of the evidence that he did not consider the demeanor of the bankrupt or his appearance, but the evidence above stated which he has certified is the basis for his conclusion that it was deliberate and the conduct was unfair to creditors and therefore fraudulent.

Argument in Reply to Appellant's First and Only Point.

Honorable Leon R. Yankwich has so clearly stated the rule and the reason therefor, and the danger of adding to a California statute a requirement of solvency at the time of the acquisition of exempt property, we submit his decision [Transcript pages 49 to 60] as a clear statement of the law applicable to this appeal.

The Referee refused to follow the rule announced by this honorable Court in the case of *Turnbeaugh v. Santos*, 146 F. (2d) 168, 169:

“The hearing was conducted by the referee with a complete misapprehension of one of the underlying principles of the homestead law, and one of the findings in a substantial aspect is grossly unfair to appellants. Over the protest of appellants’ attorney, appellants were subjected to a gruelling cross-examination as to the husband’s past debts existing at the time the wife made the homestead declaration, on the theory that a homestead declarant is acting in fraud of creditors in seeking to establish a homestead. To the contrary the very purpose of the homestead law is to afford a residence to debtors, which is free from their debts. This elemental underlying principle is summarized in California Jurisprudence, V. 13, pp. 477, 478, a much cited section. Cf. *Montgomery v. Bullock*, 11 Cal. (2d) 58, 77 P. (2d) 846; *Yager v. Yager*, 7 Cal. (2d) 213, 217, 60 P. (2d) 422, 106 A. L. R. 664; *Gray v. Brunold*, 140 Cal. 615, 620, 74 P. 303. The quoted section reads: ‘*The doctrine bearing upon conveyances made to hinder, delay and defraud creditors has no application to the creation of a homestead. A homestead is not invalid because the declarant is in debt, or*

declared the homestead to protect it from existing debts. This is the very purpose of the homestead laws.’ ”

Where California statute does not require the building and loan certificates to be purchased by a solvent debtor or within a period of time before levy by a judgment creditor, it follows for the courts to so require would be judicial legislation.

Section 6 of the Bankruptcy Act directs the allowance to the bankrupt of exemptions permitted under State Law in force at the time of the filing of the petition, as stated by the Supreme Court of the United States in *White v. Stump*, 266 U. S. 310, 5 A. B. R. (N. S.) 1:

“The Bankruptcy Law does not directly grant or define any exemptions, but directs, in Section 6, that the bankrupt be allowed the exemptions ‘prescribed by the state laws in force at the time of the filing of the petition;’ in other words, it makes the state laws existing when the petition is filed the measure of the right to exemptions.”

Also in *Holden v. Stratton*, 198 U. S. 202, 14 A. B. R. 94:

“It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to the state exemption laws. This was cogently pointed out by Circuit Judge Caldwell, in delivering the opinion in *Steel v. Buel*, where he said (104 F. 972, 5 A. B. R. 165):

“‘From the organization of the Federal courts under the Judiciary Act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the state. Judiciary Act of 1789

(1 Stat. at L. 93, Chap. 21); *Wayman v. Southard*, 10 Wheat. 1, 32, 6 L. ed. 253, 260; *Lamaster v. Keeler*, 123 U. S. 376, 31 L. ed. 238, 8 S. Ct. Rep. 197; *Dartmouth Sav. Bank v. Bates*, 44 F. 546. . . . The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the Act of 1867 (Section 5045, Rev. Stat.) but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule, observed from the creation of our Federal system, should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction.’”

Section 690 of the Code of Civil Procedure, provides:

“(Property exempt from execution or attachment.) The property mentioned in Sections 690.1 to 690.24 inclusive, this code, is exempt from execution or attachment, except as therein otherwise specially provided.

“. . . 690.21 (Same: Shares in building and loan association.) Shares of stock in any building and loan association to the value of one thousand dollars.

“690.12 (Same: Shares held by member of homestead association.) The shares held by a member of the homestead association duly incorporated, not exceeding in value one thousand dollars if the person holding the shares is not the owner of a homestead under the laws of this state.”

The evidence is clear in the case at bar that the bankrupt is not the owner of a homestead under the laws of California, and that the shares sought to be claimed exempt are shares of stock in a building and loan association, and that the value does not exceed \$1,000.00, which

brings the bankrupt squarely under the clear and express language excepting said property from the claim of creditors under California law.

Under California law no time is fixed within which the bankrupt can claim an exemption. He may do so at any time before the filing of petition in bankruptcy and after a levy of an attachment or execution by creditors. The rule is stated in 12 Cal. Jur. 345:

“A debtor is not required to claim the privilege until an occasion arises whereby the property is liable to be taken away from him. And the privilege exists until he himself, or someone authorized to do so for him, waives it, either in express words or by overt act, or by waiting more than a reasonable time before attempting to claim it. A garnishee, whether a trustee or mere debtor, cannot waive it for him, or deprive him of the opportunity to claim it without being liable to him in damages. What is a reasonable time depends upon the circumstances. An exemption cannot be waived in advance, however, such a waiver being against public policy.”

The California courts' attitude in connection with an exemption claim is stated in 12 Cal. Jur. page 332:

“Legislators are presumed to understand the force and effect of the language which is used and to have contemplated all circumstances which would make it desirable that other property not in the lists of exemptions should be added thereto. And no assumed legislative policy can justify courts in adding to the statutory list of exemptions; yet, subject to this rule—inasmuch as statutes exempting property are enacted on the ground of public policy for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence—the gen-

eral policy now is to construe such statutes liberally so as to carry out the intention of the legislature and the humane purpose designed by the law makers.”

Mr. Dudley had the cash in his name in his bank account, he purchased building and loan shares of the value of \$1,000 in his name, he had the perfect right to do all of this, and no decision or state or federal statute was violated.

The next step is to claim this property as exempt and again this is permitted by law and no statute is violated.

Creditors extend credit with knowledge of exemption statutes and a trustee in bankruptcy occupies no better position than a creditor holding a judgment.

To permit a denial of exemptions to property that was acquired when a debtor was insolvent, would destroy all exemption statutes, a workman insolvent could not claim wages he earned after he became insolvent, every homestead exemption could be tried out and its validity made to depend on the solvency of the debtor when the property was acquired and when filed. This is not the law of California which the Bankruptcy Court is required to follow.

Mr. Dudley had no home to homestead, if he had he would have been entitled to a larger exemption, he had no wages which he could have exempted, no unemployment insurance to assist him until he could rehabilitate himself. How can it be said he was depriving his creditors of \$1,000 and was guilty of fraud, when the courts daily grant larger exemptions as a matter of course.

Conclusion.

Appellant's argument and complaint settles to one premise, that the exempt property was acquired after the debtor became insolvent and when that occurred he became unable to avail himself of the rights given by law. This is contrary to every California decision. See *Jacobson v. Pope & Talbot*, 214 Cal. 758 and *Lucci v. U. S. Credit*, 220 Cal. 492.

Respectfully submitted,

COBB & UTLEY.

By FRANCIS B. COBB,

Attorneys for Respondent.

United States
Circuit Court of Appeals

For the Ninth Circuit.

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Appellants,

vs

M. C. CLARK, Attorney General of the U. S.

~~THE~~ THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

United States
Circuit Court of Appeals

For the Ninth Circuit.

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Appellants,

vs.

JAMES E. MARKHAM, as Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

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Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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District Court of the United States
for the District of Oregon

Civil Action File No. 2924

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Plaintiffs,

vs.

JAMES E. MARKHAM, as Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Defendants.

COMPLAINT

I.

Plaintiffs are natural-born citizens of the United States and reside in Portland, Multnomah County, Oregon, and neither of them has been or is now an enemy or an ally of an enemy of the United States. This action arises under the "Trading with the Enemy Act" of October 6, 1917, as amended (40 Stat. 411; U. S. C. A., Title 50, Appendix), and particularly under Section 9 thereof, as hereinafter more fully appears.

II.

Defendant James E. Markham is the duly appointed, qualified and acting Alien Property Custodian and exercises the authority vested in the Alien Property Custodian by Executive Order No. 9095, dated March 11, 1942 (7 Federal Register 1971), as amended by Executive Order No. 9193, dated [1*] July 6, 1942 (7 Federal Register 5205). Defendant The Bank of California, National Association, is a national banking association with place of business in Portland, Oregon. Defendant The United States National Bank of Portland (Oregon) is a national banking association with principal place of business in Portland, Oregon.

III.

Bertha Koehler, herein called the decedent, a citizen of the United States, died on November 20, 1943, a resident of Portland, Multnomah County, Oregon. Decedent left a last will and testament dated February 14, 1933, and a codicil thereto dated July 11, 1933. On November 29, 1943, said will and codicil were duly admitted to probate by the Circuit Court of the State of Oregon for Multnomah County, In Probate, and plaintiffs were thereupon appointed and thereafter qualified as executors thereof. A true and correct copy of said will is hereto attached, marked Exhibit A, and by this reference made a part hereof. A true and correct copy of said codicil is hereto attached,

* Page numbering appearing at foot of page of original certified Transcript of Record.

marked Exhibit B, and by this reference made a part hereof. Plaintiffs have not been discharged as executors and are now the duly appointed, qualified and acting executors of said will and codicil.

IV.

On June 6, 1944, plaintiffs filed in said Circuit Court their final account as executors and on July 18, 1944, said Circuit Court made its order approving said final account and authorizing distribution of said estate by plaintiffs as executors. A true and correct copy of said order dated July 18, 1944, is hereto attached, marked Exhibit C, and by this reference made a part hereof. [2]

V.

On August 29, 1944, plaintiffs, as executors, filed their petition in said Circuit Court reciting that distribution to themselves as trustees of the trust created by paragraph Third of the will and the codicil thereto should be made to themselves as trustees to be held in a blocked account in accordance with Executive Order No. 8389, and General License No. 30 A. On August 29, 1944, said Circuit Court made an order in response to said petition. A true and correct copy of said order dated August 29, 1944, is hereto attached, marked Exhibit D, and by this reference made a part hereof.

VI.

Pursuant to said order of distribution dated July 18, 1944, and said order dated August 29, 1944,

plaintiffs, as executors, distributed said estate to the devisees and legatees thereto entitled under the terms of the will and codicil, and in particular delivered to themselves, as trustees of the trust created by paragraph Third of the will, as modified by said codicil, one half of the residue of said estate. Subject to the qualifications stated in paragraph IX hereof relating to the stock of defendant The United States National Bank of Portland (Oregon), the assets distributed by plaintiffs as executors to themselves as such trustees are described in the schedule hereto attached, marked Exhibit E, and by this reference made a part hereof.

VII.

On September 27 and 29, 1944, plaintiffs, as such trustees and in accordance with said order dated August 29, 1944, of said Circuit Court, deposited with defendant The Bank of California, National Association, in a blocked account, personal [3] property constituting assets of said trust created by said paragraph Third of the last will and testament of the decedent and the codicil thereto. A description of assets so deposited with the defendant The Bank of California, National Association, is contained in the schedule hereto attached, marked Exhibit F, and by this reference made a part hereof. Thereupon the Federal Reserve Bank of San Francisco issued to plaintiffs as such trustees a license, No. SF43790, dated October 18, 1944, to carry on certain transactions with respect to said blocked account. A true and correct copy of said license No. SF43790 is here-

to attached, marked Exhibit G, and by this reference made a part hereof.

VIII.

On or about September 22, 1944, said executors and trustees filed in the office of the Alien Property Custodian a report on Form APC-3, a true copy of which (except for the omission of the said will and codicil which appear herein as Exhibits A and B) is hereto attached, marked Exhibit H, and by this reference made a part hereof.

IX.

The assets of the estate of the decedent distributable by plaintiffs, as executors, to legatees included 475 shares of the capital stock of the defendant The United States National Bank of Portland (Oregon). At the time of the making by said Circuit Court of the order of distribution dated July 18, 1944, said capital stock was registered in the stock record books of said defendant The United States National Bank of Portland (Oregon) in the name of said decedent. Plaintiffs have requested said defendant to transfer 237 shares to plaintiffs as such trustees, but said defendant has refused to transfer said shares in compliance [4] with said request. Plaintiffs are informed and believe, and upon such information and belief allege, that said defendant declined and still refuses to transfer said shares in compliance with said request in the belief of said defendant that it is forbidden so to do by reason of the terms of the Trading with the Enemy Act.

X.

Ilse Schloesser, the person named in paragraph Third of said will and in said codicil, was the daughter of the decedent and at the time of decedent's death was a resident of Germany. Plaintiffs last had information relating to Ilse Schloesser as of the month of May, 1945, and at that time plaintiffs were informed that she was still living and was still a resident of Germany.

XI.

As of the month of May, 1945, the last date as of which plaintiffs had information relating to Ilse Schloesser and her family, plaintiffs were informed that Ilse Schloesser was then married to Kurt Schloesser, who was then living and was a resident of Germany, and that children of Ilse Schloesser, including Maida D. Grottian, a daughter by a former marriage, and Elizabeth Schloesser, a daughter by her present husband, and Peter Grottian, son of Maida D. Grottian, were then living and were residents of Germany.

XII.

A true and correct statement of all of the transactions by plaintiffs as trustees since the date of receipt by them as trustees from themselves, as executors, of the assets of decedent's estate is contained in the schedule hereto attached, marked Exhibit I, and by this reference made a part hereof. [5]

XIII.

On March 30, 1945, defendant James E. Markham, acting as Alien Property Custodian, made his vesting order No. 4780 dated March 30, 1945. A true and correct copy of said vesting order No. 4780 is hereto attached, marked Exhibit J, and by this reference made a part hereof.

XIV.

As of the opening of business on April 23, 1945, the Federal Reserve Bank of San Francisco, acting as Fiscal Agent of the United States, by letter to plaintiffs dated April 19, 1945, revoked said License No. SF43790 and authorized plaintiffs, so far as Executive Order No. 8389 is concerned, to engage in any transaction which might be engaged in of no national of any blocked country had any interest in the property involved. A true and correct copy of said letter dated April 19, 1945, is hereto attached, marked Exhibit K, and by this reference made a part hereof.

XV.

Plaintiffs have requested defendant The Bank of California, National Association, to deliver to them assets of said trust so held in said blocked account, but said defendant has refused to do so. Plaintiffs are informed and believe, and upon such information and belief allege, that said defendants refused and still refuses to deliver said property to plaintiffs in the belief of said defendant that it is forbidden so to do by reason of the terms of the Trading with the Enemy Act.

XVI.

On October 1, 1945, plaintiffs filed with defendant James E. Markhem, as Alien Property Custodian, a notice of their claim under oath relating to the property described in said vesting [6] order No. 4780 upon the form prescribed by the Alien Property Custodian and containing the particulars as required by said Custodian. A true and correct copy of said notice of claim (complete except that copies of the will and codicil of decedent, included herein as Exhibits A and B, are not included therein) is hereto attached, marked Exhibit L, and by this reference made a part hereof.

XVII.

Plaintiff Kurt H. Koehler is the son of the decedent, Bertha Koehler. If plaintiff Kurt H. Koehler survives his sister, Ilse Schloesser, and the husband and all children and all lineal descendants of his sister, and if Ilse Schloesser survives her husband and all of her lineal descendants, and if Ilse Schloesser has died or shall die intestate, plaintiff Kurt H. Koehler will be the person entitled under the statutes of the State of Oregon to take and receive all property of said trust; and plaintiff Kurt H. Koehler is consequently a contingent beneficiary of said trust and under the circumstances recited will be entitled to all of the principal and income of said trust.

Wherefore, plaintiffs demand judgment as follows:

1. That the right and title of the plaintiffs as trustees of the trust created by paragraph Third of the will of Bertha Koehler, deceased, and the codicil thereto, be established.

2. That vesting order No. 4780 be declared to be erroneous and to vest or purport to vest in the Alien Property Custodian rights greater than those to which he is entitled under the Trading with the Enemy Act in the following respects:

(a) No "heirs" or "distributees" of Ilse Schloesser have [7] any vested rights under the terms of said trust and the rights of all beneficiaries thereunder are contingent and under certain contingencies all of the income and principal of said trust will be distributable to a citizen or citizens of the United States, residents therein, with the consequence that the Alien Property Custodian has no right to vest himself the right, title and interest of the "heirs and distributees" of Ilse Schloesser;

(b) Neither Ilse Schloesser nor any person claiming under her has any right to demand of plaintiffs as executors or as trustees any payment or delivery of any principal or income of said trust, with the consequence that the Alien Property Custodian has no right to vest in himself "the right to demand from the executors of said estate and from the trustees under said will, payment and delivery of the principal and income" of said trust;

(c) The property described in said vesting order is not "payable to deliverable" to Ilsa Schloesser or to any other national of any enemy country;

(d) The property described in said vesting order is not “owned or controlled” by Ilse Schloesser or by any national of any enemy country;

3. That plaintiffs as trustees and their successors in trust are entitled to the possession of all of the corpus of said trust and of income derived therefrom; and are entitled to administer said trust, to invest and reinvest the principal thereof, to collect all rents and all other income therefrom, to pay all expenses of administration thereof, including taxes and all other expenses of operating and maintaining said trust property and reasonable fees of plaintiffs for services as trustees and fees of counsel retained by plaintiffs for services [8] incidental to the administration of said trust, and to hold and accumulate income from said trust and invest said income in income-bearing property pending determination of the fact of who shall be entitled to the ultimate distribution of principal and income; that plaintiffs’ rights to hold and administer said property are and shall be limited only to the extent that they shall be restrained, until it is determined otherwise by this court or by any other competent and authorized governmental authority, from distributing directly or indirectly any principal or income of said trust to Ilse Schloesser, or to any person claiming through Ilse Schloesser who is now or is at the time of such proposed distribution an enemy alien as defined in the Trading with the Enemy Act or any other applicable statute or law of the United States.

4. That defendant Alien Property Custodian be restrained and enjoined from taking any action which will interfere with the free exercise by plaintiffs of their rights as stated in paragraph 3 of these prayers.

5. That defendant The Bank of California, National Association, be authorized and directed to deliver to plaintiffs on their demand all property constituting assets of said trust held by said defendant under any circumstances and particularly held by said defendant in said blocked account.

6. That defendant The United States National Bank of Portland (Oregon) be authorized and directed to transfer to plaintiffs, as trustees of said trust, said 237 shares of the capital stock of said defendant now standing on its books in the name of said decedent.

7. That in the meantime defendants be restrained and enjoined from proceeding to take any steps relating to said trust or any [9] of the assets thereof adverse to the claims and interests of the plaintiffs until the rights and interests of plaintiffs therein may be settled and determined and established.

WILLIAM L. BREWSTER
FLETCHER ROCKWOOD
HART, SPENCER, McCULLOCH &
ROCKWOOD,

Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 9, 1945. [10]

EXHIBIT A

I, Bertha Koehler, of Portland, Oregon, revoking all other wills made by me, do make, publish and declare this, my last will and testament:

First: I direct that all my property be divided by my executors into two equal parts.

Second: One of such equal parts I give, devise and bequeath to my son Kurt K. Koehler, of Portland, Oregon, if he survives me; but if he dies in my lifetime leaving a will, I direct that my executors pay over such equal part to the executors or trustees of his will for distribution to the persons and upon the terms designated therein; and if he dies intestate in my lifetime, then I give such part to his heirs and distributees in the proportions provided by the present statutes of the State of Oregon governing descent and distribution of real and personal property in cases of intestacy.

Third: The other of such equal parts I give to Kurt H. Koehler and William L. Brewster, of Portland, Oregon, not for themselves but in Trust for the following uses and purposes:

(a) My trustees shall have full power to hold said trust fund and to sell, convert, exchange, lease, mortgage, improve, invest and re-invest the same, and generally in all respects manage, handle, and dispose of each and every part of said trust fund in such securities, properties, or investments either of the character permitted by law for investment of trust funds or otherwise and in such manner and upon such terms as to them may seem best.

(b) The trustees are vested with sole discretion and power to determine what shall constitute principal of the trust fund and what shall constitute gross income therefrom or of net income available for payment under the terms of this trust.

(c) Each beneficiary under this trust is hereby restrained from and shall be without power and authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair her or their beneficial and legal rights, titles, interests, claims, and estates in and to the income or principal of this trust during the entire term hereof, nor shall the rights, titles, interests, and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary nor liable to any process of law or court, and all of the income or principal under this trust when it becomes payable direct to the beneficiaries under the terms hereof shall be transferable, payable, and deliverable solely and personally to said beneficiaries at the time entitled to take the same under the terms of this trust or to the duly appointed guardian of any beneficiary.

(d) Upon the request of any beneficiary, the trustees shall render quarterly a statement of account under this trust to such beneficiary.

(e) If either of the trustees resigns, dies, or otherwise is unable to act as trustee, the remaining trustee shall [11] appoint a successor trustee, subject, however, to the approval of my daughter Ilse Schloesser, and said successor trustee when so

appointed shall have the powers and duties of the trustee appointed by myself, including the right to appoint a successor trustee.

(f) Upon the final distribution the trustees may distribute all or any of my property in kind or may convert some or all of it into cash for payment of the net proceeds to the persons entitled thereto.

(g) My trustees shall hold the trust fund for the benefit of my daughter, Ilse Schloesser, of Alberfeld, Germany, but without her right to receive either income or principal of the trust fund for a period of twenty (20) years after my death, unless in that period the said Ilse Schloesser becomes a resident of the United States, or, if a resident of a foreign country, comes in person to Portland, Oregon, or sends thereto her duly authorized attorney in fact, and notifies the trustees in writing that she demands payment and delivery of this trust fund, and thereupon and promptly my trustees shall pay and deliver to her personally or to such attorney in fact the entire property in said trust fund, both principal and income; provided, however, my trustees may in their joint and uncontrolled discretion and only when they deem it safe and expedient and to the best interest of said Ilse Schloesser pay over to her during said period of twenty (20) years such amounts principal or income as they think best. Not later than twenty (20) years after my death my trustees shall pay and deliver any undistributed portion of the trust fund to said Ilse Schloesser, if living. If my said daughter does not survive me or if she dies before

final distribution of the trust fund, I direct that my trustees shall pay over the trust fund to the executors or trustees of her will for distribution to the persons and upon the terms designated therein; but if she dies intestate either during my lifetime or after my death and before final distribution, my trustees shall deliver and pay over said trust fund to her heirs and distributees and in the proportions provided by the present statutes of the State of Oregon governing the descent and distribution of real and personal property in cases of intestacy.

Fourth: I appoint Kurt H. Koehler and William L. Brewster executors of this my last will and testament, and I direct that no bond or undertaking be required of them as executors or trustees hereunder.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal this 14th day of February, 1933.

[Seal] /s/ BERTHA KOEHLER

The foregoing instrument was by Bertha Koehler, the testatrix therein named, signed and sealed and by her declared to be her last will and testament in the presence of us, the undersigned, who at her request and in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

ETHEL C. GRAHAM

Residing at Portland, Oregon.

C. W. KING

Residing at Portland, Oregon.

EXHIBIT B

Know All Men by These Presents, that I, Bertha Koehler, a resident and citizen of Portland, Oregon, in the United States of America, but at present visiting in Germany, do make, publish, and declare this to be a codicil to my last will and testament dated on the 14th day of February, 1933.

I hereby revoke subdivision (g) of paragraph Third of said will, and in substitution thereof I make the following provision:

(g). My trustees shall hold the trust fund for the benefit of my daughter, Ilse Schloesser, of Elberfeld, Germany, but without her right to receive either income or principal of the trust fund for a period of twenty (20) years after my death, unless in that period the said Ilse Schloesser becomes a resident of the United States, or, if a resident of a foreign country, comes in person to Portland, Oregon, or sends thereto her duly authorized attorney in fact, and notifies the trustees in writing that she demands payment and delivery of this trust fund, and thereupon and promptly my trustees shall pay and deliver to her personally or to such attorney in fact the entire property in said trust fund, both principal and income; provided, however, my trustees may in their joint and uncontrolled discretion and only when they deem it safe and expedient and to the best interest of said Ilse Schloesser pay over to her during said period of twenty (20) years such amounts principal or income as they think best. Not later than twenty (20) years after my death

my trustees shall pay and deliver any undistributed portion of the trust fund to said Ilse Schloesser, if living. If my said daughter does not survive me or if she dies before final distribution of the trust fund, I direct that my trustees shall pay over the trust fund to the executors or trustees of her will for distribution to the persons and upon the terms designated therein; but if she dies intestate either during my lifetime or after my death and before final distribution, my trustees shall deliver and pay over said trust fund to her heirs and distributees and in the proportions provided by the present statutes of the State of Oregon governing the descent and distribution of real and personal property in cases of intestacy, provided, however, that payment and delivery of the trust fund to those persons entitled to take under the will of Ilse Schloesser or under the statutes of the State of Oregon shall be made by the trustees only upon the same terms and conditions as to each of said persons that payment and delivery may be made to Ilse Schloesser as in this paragraph Third subdivision (g) is above stated, including discretionary payments by my trustees.

I hereby ratify and confirm my said will in every other respect.

In Witness Whereof, I have hereunto set my hand and seal this 11th day of July, 1933.

[Seal] /s/ BERTHA KOEHLER

Signed, sealed, published, and declared by the testatrix Bertha Koehler as and for a codicil to

her last will and testament in our presence, and we in her presence and in the presence of each other have hereunto at her request signed our names as attesting witnesses the day and year last above written.

/s/ PAUL KAUFMAN

Residing at Wuppertal, Elberfeld,
11 Juli 1933.

/s/ CARL SCHNEIDER

Residing at Wuppertal, Elberfeld,
11 Juli 1933.

EXHIBIT C

In the Circuit Court of the State of Oregon for
the County of Multnomah, Department of
Probate

No. 51211

In the Matter of the Estate of
BERTHA, KOEHLER,

Deceased.

ORDER APPROVING FINAL ACCOUNT AND AUTHORIZING DISTRIBUTION

This matter coming on to be heard upon the final report and account filed herein, and upon the other files and records in this proceedings, and

It appearing that all debts and claims against said estate, including the state inheritance tax, have

been paid and receipts filed therefor, and that no objections to said report and account have been made within the time allowed by law, and that administration of the estate has been in all respects legal and proper, and that the assets of the estate are ready for distribution, and

It further appearing that the assets to be distributed consist of cash of about \$3,100.00, jewelry, rugs, pictures and ornaments, table-glass, china and silver, household furniture and equipment and the following securities:

Bonds

- 8 \$500 Heilig Theatre Co bonds, Certs. 176/183, 6% due 1929 extended to 8/2/39
- 4 \$1,000 Southern Pacific Co bonds, Certs. 8705, 8706, 20643, 43295—4½% Gold Bonds, due 1969
- 6 U. S. Defense Bonds—maturity value at \$25.00
- 17 U. S. Defense Bonds—maturity value at \$50.00

Stocks

- 475 sh United States National Bank (Portland) Cert. × 6318, common, par \$20
- 120 sh Keystone Custodian Fund B 2 cert. 3672, par \$1.00
- 110 sh Keystone Custodian Fund B 2 cert. 1051, par \$1.00
- 405 sh Keystone Custodian Fund B 3 cert. 6600, par \$1.00
- 345 sh Keystone Custodian Fund B 3 cert. 10750 par \$1.00
- 150 sh Keystone Custodian Fund K 1 cert. 16434, par \$1.00
- 150 sh Keystone Custodian Fund K 1 cert. 16435, par \$1.00

It further appearing that the sole beneficiaries under the will are: Kurt H. Koehler; Kurt H. Koehler and William L. Brewster, Trustees under the last Will and Testament of Bertha Koehler, deceased.

It Is Hereby Ordered, that the Final Report and Account be approved and that the assets be distributed and paid to said beneficiaries, and for the purpose of distribution the executors are authorized to execute all necessary instruments of transfer, and that on the filing of the receipts of said beneficiaries for the above mentioned assets, the executors be discharged.

And the Court further finds that the names and ages of the heirs and legatees of the said estate are as follows:

Name	Relationship	Age	Residence
Kurt H. Koehler	son	60	Portland, Oregon
Ilse Schloesser	daughter	55	Wupperthal-Elberfeld, Germany

Kurt H. Koehler & William L. Brewster, Trustees under the last Will and Testament of Bertha Koehler, dec'd Portland, Oregon.

Dated July 18th, 1944.

ASHBY C. DICKSON

Judge. [16]

EXHIBIT D

In the Circuit Court of the State of Oregon, for the
County of Multnomah, Department of Probate

No. 51211

In the Matter of the Estate of

BERTHA KOEHLER,

Deceased.

ORDER AS TO DISTRIBUTION
TO THE TRUSTEES

This matter coming on to be heard upon the petition of the executors for an Order as to Distribution to the Trustees; and

It appearing to the Court that heretofore the executors filed their Final Report and Account herein, and that on July 18th, 1944, an Order was entered, approving said Final Account and authorizing distribution; and

It further appearing that by Executive Order No. 8389, of the President of the United States, the term "National" shall include "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order," and by General License No. 30A, a "Blocked Estate" is defined "As used in this general license, the term "blocked estate" shall mean any decedent's estate in which a national of a blocked country has an interest. A person shall be deemed to have an interest in a decedent's estate if

he (i) was the decedent; (ii) is a personal representative; or (iii) is a creditor, heir, legatee, devisee, distributee, or beneficiary"; and

It appearing by the terms of the Will of Bertha Koehler that one-half of the net estate herein was given to Kurt H. Koehler and William L. Brewster as Trustees for Ilse Schloesser as beneficiary, and that by the above mentioned definitions Ilse Schloesser is a national of Germany and subject to the provisions of said Executive Order, and that Portion of the estate which is distributable to the Trustees is a blocked estate; and

It further appearing that Federal Treasury officials have advised the executors herein to obtain from this Court an Order that the portion of the assets of this estate distributable to the Trustee should be distributed to them as a blocked account; and the Court being fully advised in the premises:

It Is Hereby Ordered that the property distributable to the Trustees by the order entered herein on July 18th, 1944, be distributed by the executors to the Trustees by deposit with them in a blocked account, to hold said property in trust for Ilse Schloesser, a national of Germany, as the ultimate beneficiary of said Trust: all in accordance with the statutes, proclamations, orders, and regulations of the United States relating thereto.

Dated this 29th day of August, 1944.

/s/ WALTER L. TOOZE,
Circuit Judge. [17]

EXHIBIT D

In the Circuit Court of the State of Oregon, for the
County of Multnomah, Department of Probate

No. 51211

In the Matter of the Estate of
BERTHA KOEHLER,

Deceased.

ORDER AS TO DISTRIBUTION
TO THE TRUSTEES

This matter coming on to be heard upon the petition of the executors for an Order as to Distribution to the Trustees; and

It appearing to the Court that heretofore the executors filed their Final Report and Account herein, and that on July 18th, 1944, an Order was entered, approving said Final Account and authorizing distribution; and

It further appearing that by Executive Order No. 8389, of the President of the United States, the term "National" shall include "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order," and by General License No. 30A, a "Blocked Estate" is defined "As used in this general license, the term "blocked estate" shall mean any decedent's estate in which a national of a blocked country has an interest. A person shall be deemed to have an interest in a decedent's estate if

he (i) was the decedent; (ii) is a personal representative; or (iii) is a creditor, heir, legatee, devisee, distributee, or beneficiary''; and

It appearing by the terms of the Will of Bertha Koehler that one-half of the net estate herein was given to Kurt H. Koehler and William L. Brewster as Trustees for Ilse Schloesser as beneficiary, and that by the above mentioned definitions Ilse Schloesser is a national of Germany and subject to the provisions of said Executive Order, and that Portion of the estate which is distributable to the Trustees is a blocked estate; and

It further appearing that Federal Treasury officials have advised the executors herein to obtain from this Court an Order that the portion of the assets of this estate distributable to the Trustee should be distributed to them as a blocked account; and the Court being fully advised in the premises:

It Is Hereby Ordered that the property distributable to the Trustees by the order entered herein on July 18th, 1944, be distributed by the executors to the Trustees by deposit with them in a blocked account, to hold said property in trust for Ilse Schloesser, a national of Germany, as the ultimate beneficiary of said Trust: all in accordance with the statutes, proclamations, orders, and regulations of the United States relating thereto.

Dated this 29th day of August, 1944.

/s/ WALTER L. TOOZE,
Circuit Judge. [17]

Exhibit E

ASSETS DISTRIBUTED TO TRUSTEES AS OF
JULY 31, 1944

Cash		\$ 1,814.76
		Appraised
		as of
		11/20/43
Bonds		\$ 2,065.00
4 \$500.00 Heilig Theatre Co. 6% bonds, Nos. 176/179, due 1929 ex- tended to 8/2/39, held by First National Bank of Portland un- der receipt No. 41—Feb. and Aug.	\$ 840.00	
2 \$1000.00 Southern Pacific 4½% Gold Bonds, due 1969, Nos. 8705/6	1,225.00	
Stocks		12,094.25
115 Keystone B-2.....	\$ 3,076.25	
150 Keystone K-1.....	2,415.00	
465 Keystone S-2.....	6,603.00	
(In addition to above stocks an item of 237 shares United States National Bank of Portland, par \$20, appraised at \$9,480, is still held by executors and not dis- tributed to trustees by reason of refusal of Bank to act until ap- proval of Alien Property Cus- todian)		
Jewelry		4,636.50
Household Furniture and Equipment....		533.75
Real Estate: Undivided one-half.....		20,040.00
(a) West 85 feet of Lots 7 and 8 in south half of Double Block J in City of Portland.....	\$20,000.00	
(b) Lots 16 and 17 in Block 8 Santa Rosa Park Addition to East Portland		40.00

Exhibit F

ASSETS DELIVERED TO BANK OF CALIFORNIA,
NATIONAL ASSOCIATION, IN BLOCKED
ACCOUNT

Balance Trustee's Checking account on Aug. 1, 1944	\$ 2,973.01
Four \$500 Heilig Theatre Company 6% bonds, Nos. 176 to 179, inclusive, due 1929 extended to August 2, 1939; held by First National Bank of Portland under its Receipt 41.....	840.00
Two \$1000 Southern Pacific 4½% gold bonds due 1969, Nos. 8705 and 8706.....	1,225.00
115 shares Keystone Custodian Fund B-2.....	3,076.25
150 shares Keystone Custodian Fund K-1.....	2,415.00
465 shares Keystone Custodian Fund S-2.....	6,603.00
Total.....	<hr/> \$17,132.26

EXHIBIT G

Treasury Department	License No. S.F. 43790
Office of the Secretary	Date October 18, 1944

COPY OF LICENSE

(Granted under the authority of Executive order
No. 8389 of April 10, 1940, as amended, and the
regulations and rulings issued thereunder.)

File to (Name of Licensee): Kurt H. Koehler and
William L. Brewster; (Address of Licensee): 604
Mead Building, Portland, Oregon.

Sirs:

1. Pursuant to your application of September 30,
1944, the following transaction is hereby licensed:

Engage in the following transactions in your offi-
cial capacities, as trustees of the trust created under
the Will of Bertha Koehler, deceased:

- (a) Payments of distributive shares of principal or income to all persons legally entitled thereto who are not nationals of any of the foreign countries designated in the Order; and
- (b) Other transactions arising in the administration of the trust which might be engaged in of no national of any of the foreign countries designated in the Order were a beneficiary, co-trustee or co-representative of the trust.

This license is issued subject to the powers and authorities of the Alien Property Custodian under Executive Order No. 9193, and your attention is directed to General Orders Nos. 5, 6 and 20 of the Alien Property Custodian.

This license is authorized provided all payments to blocked nationals of one of the countries designated in the Order shall be made to blocked accounts in the names of the respective payees, as nationals of such countries, in a domestic bank.

* * * see reverse * * *

2. This license is granted upon the statements and representations made in your application, or otherwise filed with or made to the Treasury Department as a supplement to your application, and is subject to the conditions, among others, that you will comply in all respects with Executive Order No. 8389 of April 10, 1940, as amended, the Regulations and Rulings issued thereunder and the terms of this license. [20]

3. The licensee shall furnish and make available for inspection any relevant information, records or reports requested by the Secretary of the Treasury, the Federal Reserve Bank through which the license was issued, the Postmaster at the place of mailing or the Collector of Customs at the port of exportation.

4. This license is not transferable, is subject to the provisions of Executive Order No. 8389 of April 10, 1940, as amended, and the Regulations and Rulings issued thereunder and may be revoked or modified at any time in the discretion of the Secretary of the Treasury acting directly or through the agency through which the license was issued, or any other agency designated by the Secretary of the Treasury. If this license was issued as a result of willful misrepresentation on the part of the applicant or his duly authorized agent, it may, in the discretion of the Secretary of the Treasury, be declared void from the date of its issuance, or from any other date.

Issued by direction and on behalf of the Secretary of the Treasury.

FEDERAL RESERVE BANK OF SAN
FRANCISCO,

By MARTIN S. PEPPER.

The Act of October 6, 1917, as amended, provides in part as follows:

“* * * whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment or both.”

Note: If this license covers gold in any form the provisions of the Provisional Regulations issued under the Gold Reserve Act of 1934 must also be complied with.

(Reverse)

This license shall not be deemed to authorize;

- (1) Distribution of the Estate of Bertha Koehler, deceased, to the trustees as such transaction may be effected pursuant to General License No. 30A.
- (2) The trustees to engage in any transaction at the request, or upon the instructions, of any beneficiary, co-trustee or co-representative of the trust, or other person who is a national of any of the foreign countries designated in the Order. [21]

EXHIBIT H

Form APC-3, August, 1942.

United States of America
Office of Alien Property Custodian

Report by Persons or Officers, Acting under Judicial Supervision or in any Court or Administrative Action or Proceeding, of Property or Interest of a Designated Enemy Country or a Designated National.

Copy of General Order No. 5.

Under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned hereby issues the following regulation:

1. All designated persons shall file a report of any property or interest in which there is reasonable cause to believe a designated enemy country or a designated national has an interest.

2. Such reports shall be submitted in duplicate on Form APC-3, which is hereby adopted and made a part of this order, shall be executed under oath and shall contain complete information in the manner provided in Form APC-3.

3. For the purposes of this order the terms:

(a) "Designated persons" shall mean persons or officers acting under judicial supervision, or in any court or administrative action or

proceeding, or in partition, libel, condemnation or other similar proceedings, including, but not by way of limitation,

- (1) executors,
- (2) administrators,
- (3) guardians,
- (4) committees,
- (5) curators,
- (6) trustees under wills, deeds or settlements,
- (7) receivers,
- (8) trustees in bankruptcy,
- (9) assignees for the benefit of creditors,
- (10) United States marshals,
- (11) sheriffs,
- (12) commissioners,
- (13) persons acting under trust agreements,
and
- (14) all other persons or officers acting in a
similar capacity;

(b) "Designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future;

(c) "Designated national" shall mean any person in any place under the control of a designated enemy country or in any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication.

4. Upon the execution of such report it shall be forwarded on or before October 1, 1942, to the Office of the Alien Property Custodian, Estates and Trusts Section, Washington, D. C. [22]

5. Subsequent to October 1, 1942, such report shall be filed on Form APC-3 by any designated person within thirty days from the date upon which such designated person qualifies.

Executed at Washington, D. C., August 3, 1942.

LEO T. CROWLEY,
Alien Property Custodian.

Instructions

1. Read carefully all of this report form, note the grouping of the several classes of property, and read instructions before beginning to make report. Use typewriter where possible, otherwise write legibly in ink.

2. Make separate reports on separate forms for each action, case, estate, trust, etc.

3. Do not leave any schedule or question unanswered. If a negative answer is intended, write "None" or "No".

4. If the space provided in any schedule in this form is inadequate, a complete schedule in like form and bearing the corresponding schedule number must be prepared, signed, attached to this report, and made a part thereof. Do not put a part of the information in the space on this form and part on an attached sheet.

5. If the person making the report holds jointly with others any of the property mentioned in any of the schedules, this fact must be stated in such schedules, with the names and addresses of the joint holders or custodians.

6. If in doubt as to "any place which, by reason of the existence of a state of war, the United States does not maintain postal communication", consult the nearest Post Office.

7. This form is to be executed and filed in duplicate.

To the Alien Property Custodian,
Washington, D. C.

The undersigned, pursuant to General Order No. 5 of the Alien Property Custodian, makes the following report of the property or interest in which there is reasonable cause to believe a designated enemy country or a designated national, as defined in said General Order No. 5, has an interest, to wit:

Part A

Person Reporting: William L. Brewster, 604 Mead Building, [23] Portland, Multnomah County, Oregon.

If jointly with others, their names and addresses:

Name: Kurt H. Koehler.

Address: 604 Mead Building, Portland, Multnomah County, Oregon.

Part B

Name of Designated Enemy Country or
Designated National

Name: Ilse Schloesser.

Last known Residence or Address: Wupperthal
Elberfeld, Germany.

Citizenship: U.S.A.

Name and Address of Attorney or Representative
in the United States: Wm. L. Brewster, 604 Mead
Building, Portland, Oregon.

Schedule 1

Capacity in Which Person Reporting is Acting

State capacity in which person reporting is acting; when and how appointed; attach copy of will, trust agreement or other instrument (if any), with statement when and where recorded; in case of decedent's estate, give name of deceased; in case of Court or administrative action or proceeding, give title and character of action or proceeding, date commenced, name of court, docket number, and name and address of attorney of record. Give general statement as to status of the administration of the estate, when last account was filed, when next account and final account are likely to be filed, and when estate is likely to be finally settled. [24]

Schedule 1

The reporter, together with above mentioned Kurt H. Koehler, are executors under the last will and testament of Bertha Koehler, a copy of which is attached. They are likewise Trustees for Ilse Schloesser under said will. The Probate proceedings in Estate of Bertha Koehler are entitled, In the Circuit Court of the State of Oregon, for the County of Multnomah, Department of Probate, In the Matter of the Estate of Bertha Koehler, deceased, No. 51 211, and were commenced on November 29, 1943. The final report and account was filed on June 7, 1944, and an order approving the final account and authorizing distribution was entered on July 18, 1944. An order as to distribution to the Trustees was entered on August 29, 1944. After recitals said order reads as follows:

“It Is Hereby Ordered that the property distributable to the Trustees by the order entered herein on July 18th, 1944, be distributed by the executors to the Trustees by deposit with them in a blocked account, to hold said property in trust for Ilse Schloesser, a national of Germany, as the ultimate beneficiary of said Trust; all in accordance with the statutes, proclamations, orders, and regulations of the United States relating thereto.”

Distribution to Kurt H. Koehler, one of the beneficiaries, has been completed. Distribution of the remaining portion of the Estate to Kurt H. Koehler and William L. Brewster, Trustees, has been completed except as to cash, about \$189.46 and 237 shares of the capital stock of United States National Bank of Portland (Oregon).

When the Alien Property Custodian and the Treasury Department consent and approve the distribution to the Trustees, including the portion of the assets which the executors have distributed, the estate can be finally settled. [25]

Schedule 3

Attached is copy (omitting affidavits and certificate) of inventory and appraisement of the Estate of Bertha Koehler, deceased. The real property was owned in fee simple and free from encumbrances except taxes and city liens which have now been paid.

Of the real estate, Item 1 was sold during administration for \$8003.15 net. Item 2 is a 3 story brick store and hotel building. Item 3 is unimproved.

On July 31, 1944 the following property was distributed or ready for distribution to Kurt H. Koehler and William L. Brewster, Trustees under the last will and testament of Bertha Koehler, deceased.

Cash	\$ 1,439.46
Distributed 7/31/44.....	\$1,250.00
Held by Executors for trust account	189.46
Bonds	
4—500 Heilig Theatre Co. 6% bonds, Nos. 176/179, due 1929, extended to 8/2/39, held by First Nat. Bank Portland, under Receipt No. 41.....	\$ 840.00
2—\$1,000 Southern Pacific 4½ Gold bonds, due 1969, Nos. 8705/6	1,225.00
10—\$50 U S Defense Bonds, issued July, Sept, Oct, Nov 1943	375.00
(U S Defense Bonds were redeemed on Aug 11 1944 for \$375.50)	
Stocks	
237 sh. United States Nat Bank (Portland) Par \$20—Comm. Cert. No. X 6318 Cert. No. 9	\$ 480.00
115 sh. Keystone Custodian Fund B-2 Par \$1 21091	3,076.25
375 sh. Keystone Custodian Fund B-3 Par. \$1 29177	6,813.75
150 sh. Keystone Custodian Fund K-1 Par. \$1 23434	2,415.00
(375 sh Keystone Custodian Fund B-3 were sold for \$6641.25 and with pro- ceeds 465 sh Keystone Custodian Fund S-2 were bought for \$6,603.00)	
Jewelry	4,636.50
Household furniture and equipment.....	533.75
Real Estate: Undivided one-half	
(a) West 85 ft of Lots 7 and 8 in S½ of Double Block J in City of Portland.....	20,000.00
(b) Lots 16 and 17 in Block 8 Santa Rosa Park Add to East Portland.....	40.00
Total.....	<hr/> \$50,874.71

The estimated annual income from the above for the Trust for Ilse Schloesser named in Part B is \$3105. [26]

In the Circuit Court of the State of Oregon for the
County of Multnomah Department of Probate

No. 51211

In the Matter of the Estate of

BERTHA KOEHLER,

Deceased.

INVENTORY AND APPRAISEMENT

PERSONAL PROPERTY

Cash in Bank of California.....	\$	695.10
Bonds		
4 \$1000 Heilig Theatre Co. bonds, Certs. 178/183, 6% due 1929 extended to 8/2/39 at 42		1,680.00
4 \$1,000 Southern Pacific Co. bonds, Certs 8705, 8706, 20643, 43295— 4½% Gold Bonds, due 1969 at 61¼	\$2,450.00	
Int.....	9.50	
		<hr/> 2,459.50
5 \$1,000 Pennsylvania R. R. 5 yr. Debentures, Certs. TM 12447/51 at 99	4,950.00	
Int.....	22.10	
		<hr/> 4,972.10

(Correcting note: The first bond item should read “8 \$500 Heilig Theatre Co bonds, Certs 176/183” etc.)

U. S. Defense Bonds, payable to Bertha Koehler and Kurt H. Koehler

1942—\$25 denomination due at maturity

December	Q84263460 E	\$18.75	
January	Q10848773 E	19.00	
July	Q30270538 E	18.87	
March	Q14680195 E	19.00	
February	Q13743637 E	19.00	
April	Q14946739 E	19.00.....	113.62

1942—\$50 denomination due at maturity

May	L 6911569 E	38.00	
September	L13362215 E	37.75	
October	L12671489 E	37.75.....	113.50

1943

November	L57000340 E	37.50 each	525.00
November	L57000341 E		
November	L57000342 E		
November	L56506984 E		
October	L56506689 E		
September	L50301535 E		
September	L50301536 E		
September	L50301537 E		
July	L40863187 E		
July	L40863217 E		
June	L37473395 E		
May	L32708432 E		
April	L31774873 E		
March	L30011616 E		

Stocks

475 sh. United States National Bank (Portland) Cert X 6318 Common, par \$20.....	\$ 19,000.00
200 sh. Phillips Petroleum, Certs 194106, 205,-796 at 44 no par.....	8,800.00
100 sh. Keystone Custodian Fund B 1 Cert. 2032, par \$1.00.....	2,849.00
120 sh. Keystone Custodian Fund B 2 Cert. 3672, par \$1.00.....	3,210.00
110 sh. Keystone Custodian Fund B 2 Cert. 1051, par \$1.00.....	2,942.50

405 sh. Keystone Custodian Fund B 3 Cert. 6600, par \$1.00.....	7,358.85
345 sh. Keystone Custodian Fund B 3 Cert. 10750, par \$1.00.....	6,268.65
150 sh. Keystone Custodian Fund K 1 Cert. 16434, par \$1.00.....	2,415.00
150 sh. Keystone Custodian Fund K 1 Cert. 16435, par \$1.00.....	2,415.00
(All except K-1 have 9/10 appreciation warrants attached)	
150 sh Portland Industries Financing Service, Cert. 413 par \$10.....	1.00
500 sh Goldfield Consolidated Mines Co., Cert. 8/27/29 8220/1 par \$1.00.....	78.12
19½ sh Gambrinus Brewing Co., Cert. 268, par \$100: 11.92.....	232.44

Miscellaneous

Jewelry	\$ 6,043.00
Piano	}----- 1,380.00
Rugs	
Pictures and ornaments	
Table-glass, china and silver	
Other household furniture and equipment }	

Real Estate—All in Multnomah County, Oregon

1. Lots 6 and 7 Block 176 Couch's Addition to City of Portland.....	\$ 7,500.00
2. West 85 ft of Lots 7 and 8 in South Half of Double Block J in City of Portland.....	40,000.00
3. Lots 16 and 17 in Block 8, Santa Rosa Park Add to East Portland	80.00
Total.....	<hr/> \$121,132.38

Schedule 2

Nature of Interests of Persons Named
in Part B Hereof

Give their respective interests and the names and addresses of all other persons interested, stating whether as legatees, devisees, creditors or otherwise. Give duration of such interests, whether for life, for years, or otherwise. In case of guardianships for life estates or in other cases where relevant, give ages of persons named in Part B hereof. None.

Schedule 3

Nature of Property or Interest Therein

State in detail all property, real, personal, and mixed, including cash on hand. Where reporter is an executor, administrator, or other personal representative of a decedent, include all real estate of which the deceased died seized or possessed, or in which he was in any way interested; describe by meets and bounds and title reference all real estate listed, including character and extent of estate or title to or in same, and whether the property is improved or unimproved, and if improved, character of improvements, estimated market value of the property and encumbrances upon same; if complete list of property or interest therein can not be given, state reason therefor and complete by supplemental report as soon as possible; if inventory or account is a matter of record, state when and where recorded and attach copy thereof, and if not

a matter of record, state reason therefor; state actual or estimated annual income from estate or trust, and estimated values of distributable shares of principal and of annual distributable income therefrom of persons named under Part B; if estate or trust is audited by public accountant, state name and address. In all other cases give similar complete information.

Schedule 4

Interests of Unknown Designated Nationals

If the person reporting has reasonable cause to believe that any property or interest therein is owned by a designated national, and is not advised of the name thereof, state that fact, together with a statement of the interest thereof.

Nature and extent of the interest: None. [29]

Schedule 5

General Remarks

(Here include any relevant information not set forth above.)

Bertha Koehler died Nov. 20, 1943, and on said date and long prior thereto, was a citizen of the United States. Kurt H. Koehler and William L. Brewster at all times since birth have been citizens of the United States. Since distribution on or about July 31, 1944, the Trust Fund has been kept separate and unmingled with any other property.

[Seal]

WILLIAM L. BREWSTER

Signature of party making
report.

(Partnerships shall sign by member or duly authorized representative. Corporations or associations shall sign by officer or duly authorized representative, and shall affix corporate or official seal.)

Affidavit of Person Making Report

State of Oregon,
County of Multnomah—ss:

I, William L. Brewster, swear (affirm) that I am the person, or that I am the one of the Trustees and executors under the last will and testament Bertha Koehler making this report, that I am qualified and authorized to make this report and this affidavit, and to the best of my knowledge and belief the statements made in this report are true and accurate, and all material facts have been set forth.

WILLIAM L. BREWSTER

Signature of affiant

604 Mead Building

Subscribed and sworn to before me this 22 day of September, 1944.

[Notarial Seal]

FLORENCE M. WILLIAMS,

Notary Public for Oregon.

My commission expires Aug. 17, 1946. [30]

EXHIBIT I

TRANSACTIONS OF TRUSTEES

August 1, 1944, to Sept. 10, 1945

1944		
8/ 1	Cash in checking account—Bank of California	\$2,973.01
	Wolfgang Delbrueck—gift in mem- ory of Bertha Koehler.....	\$ 250.00
	Ella Fitzgerald—gift in memory of Bertha Koehler.....	550.00
	City Treasurer, final payment lighting system S. W. Washing- ton	18.80
8/ 9	Heilig Theatre Bond—interest.....	60.00
	Portland Wire & Iron Works— fire escape	18.38
8/21	Keystone K-1 dividend	180.00
9/12	Irving B. Lincoln, agent, Aug. 10 to Sept. 10 account.....	150.00
9/29	Bank of California, safe custody fees	4.50
	Bank of California, safe custody fees75
10/ 2	U. S. National Bank dividend.....	94.80
10/13	Irving B. Lincoln, agent, Sept. 10 to Oct. 9 account.....	150.00
10/19	Keystone Cus. Funds B-2 divi- dend	373.75
10/26	Southern Pacific, interest	45.00
11/13	U. S. 1943 income tax refund, prin. \$44.05, int. \$1.63.....	45.68
11/14	Irving B. Lincoln, agent, month ending Nov. 10	150.00
11/18	Keystone Custodian Fund S-2 dividend	302.25
11/22	1943 Bertha Koehler estate tax deficiency	113.17
12/11	Irving B. Lincoln, agent, month ending Dec. 8	150.00

That such property is in the process of administration by William L. Brewster and Kurt H. Koehler, as Executors and Trustees, acting under the judicial supervision of the Circuit Court of the State of Oregon for the County of Multnomah;

And determining that to the extent that such nationals are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country, (Germany);

And having made all determinations and taken all action required by law, including appropriate consultation and certification, and deeming it necessary in the national interest,

Hereby Vests in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in an appropriate account or accounts, pending further determination of the Alien Property Custodian. This Order shall not be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall it be deemed to indicate that compensation will not be paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

Any person, except a national of a designated enemy country, asserting any claim arising as a re-

sult of this Order may, within one year from the date hereof, or within such further time as may be allowed, file with the Alien Property Custodian on Form APC-1 a notice of claim, together with a request for a hearing thereon. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim. [33]

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Executed at Washington, D. C. on March 30, 1945.

[Official Seal]

/s/ JAMES E. MARKHAM,
Alien Property Custodian.

I hereby certify that the within is a true and correct copy of the original paper on file in this office.

JAMES E. MARKHAM
Alien Property Custodian.

By /s/ LLOYD L. SHANKS,
Secretary for Records, Office of
Alien Property Custodian.

EXHIBIT K

Federal Reserve Bank of San Francisco

Fiscal Agent of the United States

San Francisco 20, California

April 19, 1945.

Messrs. William L. Brewster and
Kurt H. Koehler,
604 Mead Building,
Portland, Oregon.

Re: Estate of Bertha Koehler, deceased

Dear Sirs:

Reference is made to Vesting Order No. 4780 executed by the Alien Property Custodian.

In view of such order you are authorized, so far as Executive Order No. 8389, as amended, is concerned, to engage in any transaction with respect to all right, title, interest, and claim of any kind or character whatsoever of Ilse Schloesser, and her heirs and distributees, in and to the estate of Bertha Koehler, deceased, on and after April 23, 1945, which might be engaged in without specific license of the Treasury Department if no national of any blocked country had any interest in such property.

License No. SF 43790 issued under Executive Order No. 8389, as amended on October 18, 1944 is hereby revoked as of the opening of business on April 23, 1945.

It is suggested that you communicate with the Office of the Alien Property Custodian, 417 Mont-

gomery Street, San Francisco 4, California, concerning the applicability to the estate under reference of any orders, rulings, or regulations of such office.

Yours very truly,

/s/ MERRITT SHERMAN,
Assistant Cashier. [35]

EXHIBIT L

Form APC-1, June, 1942
United States of America
Office of Alien Property Custodian

NOTICE OF CLAIM ARISING AS A
RESULT OF VESTING ORDER

These instructions should be read carefully before filling out this form.

A. The use of Form APC-1 is expressly limited to person (1) who assert a claim arising as a result of a specific vesting order and (2) who are permitted to file a notice of claim pursuant to the provisions of such vesting order or pursuant to regulations promulgated by the Office of Alien Property Custodian.

B. This form must be executed and filed in triplicate with the Office of Alien Property Custodian, Washington, D.C. The original shall be executed under oath before an officer authorized to admin-

ister oaths, or if executed outside of the United States, before a diplomatic or consular officer of the United States.

C. If the space provided is insufficient to furnish information required herein, utilize properly identified schedules attached as exhibits.

D. If claimant has no knowledge as to any particular information required, so indicate by inserting the term "No knowledge" in blank space.

E. Wherever citizenship or subject status is required to be specified herein, (1) in the case of a partnership, the citizenship or subject status of all partners must be indicated; (2) in the case of a corporation, association, or other organization, the state, country or other jurisdiction under the laws of which said corporation, association or other organization was organized must be indicated as well as the principal place of doing business; (3) in the case of a stateless person, so indicate.

F. The term "person" as used in this form means an individual, partnership, corporation, association, or other organization or body politic, and the plural as well as the singular thereof. [36]

G. Hearing on the claim, if the notice thereof is properly executed and if full and complete information is given, will be granted in accordance with the rules and regulations of the Custodian only after notice of the place, date and time of such hearing is mailed by the Custodian to the person specified in Section numbered "2" of this form, at the address there given.

To the Alien Property Custodian,
Washington, D. C.

The undersigned, hereinafter referred to as "claimant", desiring to take advantage of the procedure established by the Office of Alien Property Custodian for the filing of claims arising as a result of a specific vesting order, hereby gives you notice of claim and requests a hearing thereon:

1. a. Name of claimant: Kurt H. Koehler and William L. Brewster as executors and trustees (See Schedule 1.a.)
b. Address of claimant: 604 Mead Building, Portland 4, Oregon.
2. Notice or communications with respect to this claim are to be sent to: William L. Brewster whose address is: 604 Mead Building, Portland 4, Oregon.
3. a. Claimant is a citizen or subject (see Instruction E) of: United States.
b. Has claimant been a citizen or subject of another country at any time since April 8, 1940? No.
c. Specify all countries in which claimant has resided at any time since April 8, 1940 (if claimant is a partnership state the countries in which all partners have resided; if claimant is a corporation, association or other organization, specify all principal places of doing business); Claimants have resided in the United States continuously since April 8, 1940. [37]

d. Has claimant or claimant's property at any time been subjected to "freezing controls" pursuant to Executive Order No. 8389, as amended, for the reason that claimant was or is a "national" of a foreign country designated in said Executive Order? No. If answer is "yes", list all such foreign countries of which claimant has been deemed to be a "national": Property which claimants hold as fiduciaries was subject of "freezing control" under Executive Order No. 8389 because Ilse Schloesser, named as a contingent beneficiary of the trust administered by claimants, was deemed to be a "national" of Germany.

4. a. Describe accurately the vested property with respect to which this notice of claim is filed: See Schedule 4. a.
b. Immediately before said property was vested in the Alien Property Custodian, it was in the possession of the following person (see Instruction F) Claimants and The Bank of California, National Association, whose address then was: 604 Mead Building, Portland 4, Oregon, respectively.
c. Said property was vested in the Alien Property Custodian by vesting Order Number 4780 dated March 30, 1945.
5. Specify the nature of the claim of which notice is hereby given. (Give full and precise information as to the basis for the claim, the amount thereof and all pertinent circumstances upon which claimant rules. If necessary to indicate

the nature of the claim, pertinent documents, properly identified may be attached as exhibits.) See Schedule 5. [38]

6. Claimant represents and alleges that the claim on which notice is given is in all respects bona fide and that there are no set-offs, counterclaims or defenses against said claim, except as are specified below with particularity: None; that this notice of claim is not filed in collusion with any person for the purpose of circumventing or avoiding the terms and provisions of the Trading with the Enemy Act, as amended (including, but not limited to, the amendment thereof by Title III of the First War Powers Act, 1941), or any rules or regulations issued pursuant thereto; and that claimant knows of no person (see Instruction F) whatsoever, except as specified below with particularity, who has any interest whatsoever, direct or indirect, legal, equitable or beneficial, in the claim of which notice is hereby given, or in the proceeds thereof:

Name	Address	Citizenship or Subject Status (See Instruction E)	Nature of Interest
Ilse Schloesser	Elberfeld, Germany	National of Germany	Contingent beneficiary under trust
Kurt H Koehler	2804 N. W. Westover Portland, Oregon	United States	Contingent beneficiary under trust

Dated this 20 day of Sept., 1945.

/s/ KURT H. KOEHLER

Claimant

WILLIAM L. BREWSTER

As such Executors and Trustees.

If claimant is an individual, his signature alone is sufficient unless the notice of claim is executed by a duly authorized representative. Partnerships must sign by a member or duly authorized representative. Corporations, associations or other organizations or bodies politic must sign by a duly authorized officer or other duly authorized representative and must affix the corporate or official seal, unless there is no such seal, in which case such fact must be indicated. Any person executing this form in a representative capacity must indicate in what capacity he signs and (except where such person is a member of a partnership or officer of a corporation) must attach a properly identified and verified copy of his power of attorney or other evidence of authority.

AFFIDAVIT

United States of America,
State of Oregon,
County of Multnomah—ss:

I, Kurt H. Koehler and William L. Brewster, swear (or affirm) that I am the claimant specified in the foregoing notice of claim (or the of the claimant, duly authorized to execute this notice of claim): that the facts stated in said notice of claim and all exhibits attached thereto are true and correct; and that I have knowledge of no fact re-

quired to be set forth in the above form which is not fully and accurately set forth therein.

/s/ KURT H. KOEHLER,

(Affiant)

/s/ WILLIAM L. BREWSTER,

(Affiant)

Subscribed and sworn to (or affirmed) before me this 20 day of Sept., 1945.

[Notarial Seal]

/s/ FLORENCE M. WILLIAMS,

Notary Public for Oregon.

My commission expires: 8-27-46. [40]

Schedule 1.a.

Answer to question 1.a.

Kurt H. Koehler and William L. Brewster as executor of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and Kurt H. Koehler in his individual capacity.

Schedule 4.a.

Answer to question 4.a.

The "vested property" as described in Vesting Order No. 4780, hereinafter referred to, is as follows:

"All right, title, interest and claim of any kind or character whatsoever of Ilse Schloes-

ser, and her heirs and distributees, in and to the estate of Bertha Koehler, deceased, and under clause 'Third' of the will of said Bertha Koehler, and paragraph (g) thereof per codicil dated July 11, 1933, including the right to demand from the executors of said estate and from the trustees under said will payment and delivery of the principal and income of a certain trust fund, for which provision is made in said clause 'Third' of said will and said codicil thereto."

Schedule 5.

Answer to question 5.

1. Bertha Koehler, herein called the decedent, a citizen of the United States, died on November 20, 1943, a resident of Portland, Multnomah County, Oregon. Decedent left a last will and testament dated February 14, 1933, and a codicil thereto dated July 11, 1933. On November 29, 1943. said will and codicil were duly admitted to probate by the Circuit Court of the State of Oregon for Multnomah County, In Probate, and claimants were thereupon appointed and thereafter qualified as executors thereof. A certified copy of said will and codicil is hereto attached. Claimants have not been discharged as executors and are now the duly appointed, qualified and acting executors of said will and codicil.

2. On June 6, 1944, claimants filed in said Circuit Court their final account as executors and on July 18, 1944, said Circuit Court made its order approving said final account and authorizing distribution of said estate, by claimants as executors, and in compliance with said order, and except in the respects hereinafter noted, claimants, as executors, distributed to themselves, as trustees under said last will and testament and codicil, the property of said estate which, as trustees, they were entitled to receive under said order authorizing distribution.

3. On August 29, 1944, said Circuit Court, on petition of claimants as executors, directed that the assets then held [41] by claimants as trustees be held in a blocked account in accordance with Executive Order No. 8389 and General License 30 A.

4. On September 27, and 29, 1944, claimants, as trustees, and in accordance with said order dated August 29, 1944, deposited with The Bank of California, National Association, at its office at Portland, Oregon, in a blocked account, personal property constituting assets of said trust created by paragraph "Third" of the last will and testament of decedent and the codicil thereto. Thereupon the Federal Reserve Bank of San Francisco issued to claimants as such trustees a license, No. SF43790, dated October 18, 1944, to carry on certain transactions with respect to said blocked account.

5. The assets of the estate of the decedent distributable by claimants as executors to legatees in-

cluded 475 shares of the capital stock of the United States National Bank of Portland (Oregon). At the time of the making by said Circuit Court of the order of distribution dated July 18, 1944, said capital stock was registered in the stock record books of The United States National Bank of Portland (Oregon) in the name of decedent. Claimants have requested said The United States National Bank of Portland (Oregon) to transfer 237 of said shares to claimants as such trustees but said The United States National Bank of Portland (Oregon) has refused to transfer said shares in compliance with said request.

6. Ilse Schloesser, the person named in paragraph "Third" of said will and in said codicil, was the daughter of the decedent, Bertha Koehler, and at the time of the decedent's death was a resident of Germany. Claimants last had information relating to Ilse Schloesser in the month of May, 1945, and that time claimants were informed that she was still living and was still a resident of Germany.

7. As of the month of May, 1945, the last date as of which claimants had information relating to Ilse Schloesser and her family, claimants were informed that Ilse Schloesser was then married to Kurt Schloesser, who was then living and was a resident of Germany, and that the children of Ilse Schloesser, including Maida D. Grottian, a daughter, by a former marriage, and Elizabeth Schloesser, a daughter by her present husband, and Peter Grot-

tian, son of Maida D. Grottian, were then living and were residents of Germany.

8. As of the opening of business on April 23, 1945, the Federal Reserve Bank of San Francisco, acting as Fiscal Agent of the United States, by a letter to claimants dated April 19, 1945, revoked said license No. SF43790 and authorized claimants, so far as Executive Order No. 8389 is concerned, to engage in any transaction which might be engaged in if no national of any blocked country had any interest in the property involved.

9. Kurt H. Koehler, one of the claimants herein named, is a son of decedent, Bertha Koehler, and upon the happening of certain events which may happen in the future will be entitled to all of the principal and income of said trust now administered by claimants. [42]

10. Claimants assert that said Vesting Order No. 4780 is erroneous and vests or purports to vest in the Alien Property Custodian rights greater than those to which he is entitled under the Trading with the Enemy Act in the following respects:

(a) No "heirs" or "distributees" of Ilse Schloesser have any vested rights under the terms of said trust and the rights of all beneficiaries thereunder are contingent and under certain contingencies all of the income and principal of said trust will be distributable to a citizen or citizens of the United States, resi-

dents therein, with the consequence that the Alien Property Custodian has no right to vest in himself the right, title and interest of the "heirs and distributees" of Ilse Schloesser;

(b) Neither Ilse Schloesser nor any person claiming under her has any right to demand of claimants as executors or as trustees any payment or delivery of any principal or income of said trust, with the consequence that the Alien Property Custodian has no right to vest in himself "the right to demand from the executors of said estate and from the trustees under said will, payment and delivery of the principal and income" of said trust;

(c) The property described in said vesting order is not "payable or deliverable" to Ilse Schloesser or to any other national of any enemy country;

(d) The property described in said vesting order is not "owned or controlled" by Ilse Schloesser or by any national of any enemy country. [43]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, James E. Markham, as Alien Property Custodian, by Carl C. Donough, United States Attorney for the District of Oregon, and J. Robert Patterson, Assistant United States Attorney, and moves the Court for an order dismissing the action against James E. Markham as Alien Property Custodian for the reason that the complaint fails to state a claim against the defendant, James E. Markham as Alien Property Custodian, upon which relief can be granted in that it appears from the face of the complaint that the property which is the subject of the action has not been delivered or paid to the defendant, James E. Markham as Alien Property Custodian, and that neither the Trading With the Enemy Act nor any other statute of the United States authorizes a suit against the defendant, James E. Markham, as Alien Property Custodian, for a declaration of the right and title of any persons as against the Custodian or for a declaration of the efficacy or validity of a vesting order issued by the Alien Property Custodian until after the possession of the vested property is transferred, delivered or [44] paid to the Alien Property Custodian.

Dated at Portland, Oregon, this 6th day of December, 1945.

CARL C. DONAUGH,

United States Attorney for
for the District of Oregon.

J. ROBERT PATTERSON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

Due and legal service of the within Motion to Dismiss is hereby accepted within the State and District of Oregon, on the 6th day of December, 1945, by receiving a copy thereof duly certified to as true and correct copy of the original by Carl C. Donough, United States Attorney for the District of Oregon, through J. Robert Patterson, Assistant United States Attorney.

HART, SPENCER,
McCULLOCH & ROCKWOOD,
/s/ FLETCHER ROCKWOOD,
Attorneys for Plaintiffs.

United States of America,
District of Oregon—ss.

Due and legal service of the within Motion to Dismiss is hereby accepted within the State and District of Oregon on the 6th day of December, 1945, by receiving a copy thereof duly certified to as true and correct copy of the original by Carl C. Donough, United States Attorney for the District of Oregon, through J. Robert Patterson, Assistant United States Attorney.

/s/ WM. L. BREWSTER,
Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 6, 1945.

[Title of District Court and Cause.]

ANSWER

The defendant, James E. Markham, as Alien Property Custodian, answering the complaint herein:

1. Denies those allegations contained in paragraph I of the complaint which allege that this action arises under the Trading with the Enemy Act of October 6, 1917, as amended (40 Stat. 411; U. S. C. A., Title 50 App.), or under § 9 thereof. Denies any knowledge or information sufficient to form a belief as to those allegations contained in paragraph I of the complaint which allege that the plaintiffs or either of them has not been or is not now an enemy or an ally of an enemy of the United States.

2. Denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph XII of the complaint. [47]

3. Denies each and every allegation contained in paragraph XVII of the complaint, except that the plaintiff Kurt H. Koehler is the son of the decedent Bertha Koehler.

And or a First, Separate and Complete Affirmative Defense to the Complaint, this Defendant Alleges:

4. The court lacks jurisdiction over the subject matter of this action.

And for a Second, Separate and Complete, Affirmative Defense to the Complaint, This Defendant Alleges:

5. The complaint fails to state a claim against the defendants James E. Markham upon which relief can be granted.

And for a Third, Separate and Complete, Affirmative Defense to the Complaint, This Defendant Alleges:

6. The plaintiff Kurt H. Koehler, in his individual capacity, lacks capacity to sue in that insofar as he is an heir or distributee of Bertha Koehler, deceased, either contingent or otherwise, he is a national of a designated enemy country, as determined by this defendant in Vesting Order No. 4780 executed March 30, 1945, and published in the Federal Register on April 11, 1945 (10 Fed. Reg. 3928).

And for a Fourth, Separate and Partial Affirmative Defense to the Complaint, This Defendant Alleges:

7. There is a misjoinder of parties defendant in that the United States has consented to be sued through the Alien Property Custodian only under the provisions of the Trading with the Enemy Act, and that under the provisions of that act only the

Alien Property Custodian or the Treasurer of the United States is a proper party defendant.

JOHN F. SONNETT,
Assistant Attorney General.

HENRY L. HESS,
United States Attorney,
Portland, Oregon.

HARRY LeROY JONES,
ALBERT PARKER,
Special Assistants to the
Attorney General.

IRVING JAFFE,
Attorney, Alien Property Section, Claims Division,
Department of Justice.
Attorneys for James E. Markham, Alien Property
Custodian.

United States of America,
District of Oregon—ss.

Due and legal service of the within Answer is hereby accepted within the State and District of Oregon, on the 29th day of March, 1946, by receiving a copy thereof duly certified to as a true and correct copy of the original by Victor E. Harr, Assistant United States Attorney for the District of Oregon.

/s/ FLETCHER ROCKWOOD,
Attorney for Plaintiffs.

[Endorsed]: Filed March 29, 1946.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, THE UNITED
STATES NATIONAL BANK OF PORT-
LAND (OREGON)

Comes now the defendant, The United States National Bank of Portland (Oregon), a national banking association, and for answer to plaintiffs' Complaint on file herein admits, denies, and alleges:

I.

Admits Paragraphs I, II, III, IV, V, and VI of plaintiffs' Complaint and the whole thereof; and

II.

For answer to Paragraphs VII and VIII alleges that it is without any knowledge or information as to the matters and things in said paragraphs alleged sufficient to form a belief concerning the same, and therefore, denies said paragraphs and the whole thereof;

III.

Answering Paragraph IX of plaintiffs' Complaint, defendant denies the same and the whole thereof except as hereinafter in defendant's further and separate answer expressly admitted;

IV.

Answering Paragraphs X, XI, XII, XIII, XIV, XV, and XVI alleges that it is without any knowl-

edge or information as to the matters and things in said paragraphs alleged sufficient to form a belief concerning the same, and therefore, denies said paragraphs and the whole thereof; [50]

V.

Answering Paragraph XVII defendant admits the same and the whole thereof

And for a further and separate answer to plaintiffs' Complaint this defendant alleges:

I.

That the assets of the estate of Bertha Koehler, deceased, distributable to the persons entitled thereto included Four Hundred Seventy Five (475) shares of the capital stock of the defendant The United States National Bank of Portland (Oregon) and that at the time of the making by the Circuit Court of the State of Oregon of its order of distribution in said decedant's estate on the 18th day of July, 1944, said capital stock was registered in the stock record books of the defendant The United States National Bank of Portland (Oregon) in the name of the decedant Bertha Koehler, and that plaintiffs thereafter requested said defendant to transfer Two Hundred Thirty Seven (237) shares of said stock to plaintiffs as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased; and that said defendant refused to transfer said shares in compliance with said request for the reason that said plaintiff-trustees

failed and neglected to lodge with the defendant-bank a good and sufficient clearance from the Alien Property Custodian as required under General Order No. 20 as issued and promulgated by said Alien Property Custodian, pursuant to and under the authority of the Trading with the Enemy Act as amended, and Executive Order No. 9095; and that upon receipt of a duly and regularly issued license as aforesaid lodged with it, The United States National Bank of Portland (Oregon) is ready, willing and able to transfer said shares to such persons as are then legally entitled to receive them.

Wherefore, defendant prays that plaintiffs' Complaint be dismissed as to this answering defendant.

PLATT, HENDERSON, WARNER,
CRAM & DICKINSON,

Attorneys for the defendant The United States National Bank of Portland (Oregon)

/s/ HAROLD J. WARNER,
Of Counsel for Defendant Bank.

State of Oregon,
County of Multnomah—ss:

I, R. M. Alton, being first duly sworn, say that I am a trust officer of The United States National Bank of Portland (Oregon), the defendant in the within entitled suit and that the foregoing Answer is true, as I verily believe.

/s/ R. M. ALTON,

Subscribed and sworn to before me this 5th day of April, 1946.

[Seal] /s/ H. F. PRIDEAUX,

Notary Public for Oregon.

My commission expires 3/12/49.

Due and timely service of the foregoing and the receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 5th day of April, 1946.

/s/ WM. L. BREWSTER,

Of Attorneys for Plaintiffs.

[Endorsed]: Filed April 6, 1946. [52]

[Title of District Court and Cause.]

ANSWER

Comes now defendant, The Bank of California, National Association, and for answer to the complaint of plaintiff admits, denies and alleges as follows:

I.

Answering Paragraph VI this defendant alleges that it has neither knowledge nor information of the matters therein alleged.

II.

Answering Paragraph VII this defendant admits that on or about September 27 and September 29, 1944, plaintiffs as trustees deposited with defendant personal property other than money, as set forth in

Exhibit F to plaintiffs complaint. In connection with said moneys, this defendant alleges that on or about July 29, 1944, plaintiffs, as trustees, opened a checking account with defendant; that on August 7, 1944, the balance of said account was \$3,490.00. Defendant admits the Federal Reserve Bank of San Francisco issued plaintiffs a license, No. SF 43790, dated October 18, 1944. Except as expressly admitted herein, defendant denies generally and specifically each and every allegation contained in said paragraph.

III.

Answering Paragraph VIII defendant alleges it has no knowledge of the matters therein alleged.

IV.

Answering Paragraph IX defendant alleges it has no knowledge of the matters therein contained.

V.

Answering Paragraph X defendant alleges it has no knowledge of the matters therein contained.

VI.

Answering Paragraph XI defendant alleges it has no knowledge of the matters therein contained.

VII.

Answering Paragraphs XVI defendant alleges it has no knowledge of the matters therein contained.

Wherefore having answered the complaint of plaintiff, this defendant prays that the Court enter

such a judgment as is fit and proper under the circumstances.

HAMPSON, KOERNER,
YOUNG & SWETT,
R. R. MORRIS,

Attorneys for defendant, The Bank of California,
National Association.

State of Oregon,
County of Multnomah—ss:

Service of the foregoing Answer by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 1st day of May, 1946.

/s/ FLETCHER ROCKWOOD,
Attorney for Plaintiffs.

[Endorsed]: Filed May 1, 1946.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR JUDGMENT
ON THE PLEADINGS

The defendant moves the court for judgment on the pleadings against the plaintiff herein.

HENRY L. HESS,
United States Attorney,
Portland, Oregon.

VICTOR E. HARR,
Assistant United States
Attorney.

HERMAN H. HAHNER,
Assistant United States
Attorney.

[Endorsed]: Filed No. 7, 1946.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties herein, through their respective attorneys, William L. Brewster, Fletcher Rockwood, and Hart, Spencer, McCulloch and Rockwood, representing the Plaintiffs and Henry L. Hess, United States Attorney, for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, representing the Defendants, that subject to the approval of the Court an order may be entered amending the Defendant's Answer as follows:

That Paragraph 2 thereof on Page 1 be amended by striking therefrom "III" and inserting in its stead "XII." Made and entered at Portland, Oregon, this 7th day of November, 1946.

HART, SPENCER, McCULLOCH
AND ROCKWOOD,
WILLIAM L. BREWSTER,
/s/ FLETCHER ROCKWOOD,
Attorneys for Plaintiffs.

HENRY L. HESS,
United States Attorney for the
District of Oregon.

VICTOR E. HARR,
Assistant United States Attorney.

Attorneys for Defendants.

[Endorsed]: Filed Nov. 12, 1946.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

The case is dismissed for want of jurisdiction in that the United States has not consented to be made a co-defendant. The defendant may prepare Findings, if Findings are deemed necessary.

Dated January 30, 1947.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Jan. 30, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the undersigned Judge on Thursday, January 23, 1947, plaintiffs were present in person and represented by their counsel, Fletcher Rockwood, and James E. Markham, as Alien Property Custodian of the United States, was represented by his counsel, Victor E. Harr and Herman H. Hahner, Assistant United States Attorneys for the District of Oregon; thereupon oral and documentary evidence was introduced by and on behalf of plaintiffs herein, and no evidence, oral or documentary, being produced by defendant, James E. Markham, Alien Property Custodian, and at the conclusion of all of the evidence the parties rested; and thereupon the cause

was argued to the Court by the respective parties and the same was by the Court taken under advisement; and the Court, having considered all the evidence introduced and the arguments of counsel, and having considered the defendant James E. Markham's Motion to dismiss the complaint, and defendant Markham's Motion for Judgment on the pleadings theretofore filed and argued by counsel for plaintiffs and defendant James E. Markham, which said Motions were taken under advisement memo of decision having been filed and vacated and now being advised in the [58] premises, makes and orders its Findings of Fact and Conclusions of Law, as follows:

I.

Plaintiffs are citizens of the United States and reside in Portland, Multnomah County, Oregon, and that this action arises under the Trading with the Enemy Act of October 6, 1917, as amended, (40 Stat. 411; U. S. C. A. Title 50, Append.).

That James E. Markham is the duly appointed, qualified and acting Alien Property Custodian, and exercises the authority vested in the Alien Property Custodian by Executive Order 9095, dated March 11, 1942, (Fed. Reg. 7, 1971), as amended by Executive Order 9193, dated July 6, 1942, (Fed. Reg. 7, 5205).

III.

That Bertha Koehler, a citizen of the United States, died November 20, 1943, a resident of Portland, Multnomah County, Oregon, leaving a last

Will and Testament dated February 14, 1933, and Codicil thereto dated July 11, 1933, which said Will and Codicil were duly admitted to probate by the Circuit Court, State of Oregon, for Multnomah County, in Probate, and that plaintiffs were thereupon appointed and thereafter qualified as executors thereof.

IV.

That on June 4, 1944, plaintiffs filed in said Circuit Court their Final Account as said executors, and on July 18, 1944, said Circuit Court issued an Order approving said final account and authorizing distribution of said estate by plaintiffs, as executors.

V.

That on August 29, 1944, plaintiffs, as executors, filed their Petition in Circuit Court, reciting that distribution to themselves, as Trustees of the Trust created by Paragraph Third of the Will and the Codicil thereto, should be made to themselves, as Trustees, to be held in a blocked account in accordance with Executive Order 8389, and General License No. 30A.

VI.

That pursuant to an Order of said Circuit Court, pursuant to said petition, plaintiffs distributed said estate in accordance with terms of the Will and Codicil, and in particular delivered to themselves, as Trustees of the Trust created by paragraph "Third" of the Will, as modified by said Codicil, one-half of the residue of said estate, and in accord-

ance with the Order of said Court delivered to defendant, the United States National Bank of Portland (Oregon) and defendant Bank of California, a National Association, in a blocked account, certain portions of said estate.

VII.

That the one-half of the residue of said estate thus paid to the Trustees of the Trust, created by said paragraph "third" of the will, as modified by said Codicil, was property bequeathed and devised to Ilsa Schloesser and her heirs and distributees.

VIII.

That defendant Markham, on March 30, 1945, made and executed his Vesting Order No. 4780, published April 11, 1945 (10 Fed. Reg. 3928). "vesting all right, title, interest and claim of any kind or character whatsoever of Ilsa Schloesser, her heirs and distributees in the estate of Bertha Koehler, deceased, and under clause "Third" of the Will of said Bertha Koehler, and paragraph (g) thereof, of Codicil dated July 11, 1933, including the right to demand from the executors of said estate, and from the Trustees of the said Will, payment and delivery of the principal and income of a certain trust fund, for which provision is made in said clause "Third" of said Will, and said Codicil thereto," and by said Vesting Order, defendant Markham further found that the aforesaid property was property payable or deliverable to, or claimed by, Nationals of a designated enemy country, Ger-

many, namely, Ilsa Schloesser, her heirs and distributees, and that such property is property within the United States, owned or controlled by the said Nationals of a designated enemy country, Germany.

IX.

That although demand was made therefor by defendant Markham, delivery of possession of any of the said residue of the estate has not been made to the Alien Property Custodian.

Conclusions of Law

I.

That this suit against the Alien Property Custodian is a suit against the United States.

II.

That this Court is without jurisdiction to hear this case, in that the United States has not consented to be made a co-defendant.

Dated at Portland, Oregon, this 22nd day of May, 1947.

/s/ CLAUDE McCOLLOCH,
Judge.

United States of America,
District of Oregon—ss:

Service of the within Findings of Fact and Conclusions of Law is hereby accepted within the State and District of Oregon, on the 5th day of March, 1947, by receiving a copy thereof duly certified to

as a true and correct copy of the original by Herman H. Hahner, Assistant United States Attorney for the District of Oregon.

/s/ FLETCHER ROCKWOOD,
Attorney for Plaintiffs.

[Endorsed]: Filed May 22, 1947. [61]

In the District Court of the United States
for the District of Oregon
Civil Action File No. 2924

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity

Plaintiffs,

vs.

JAMES E. MARKHAM, as Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Defendants.

JUDGMENT ORDER

This cause came on regularly for trial before the undersigned Judge on Thursday, January 23, 1947.

Plaintiffs were present in person and represented by their counsel, Fletcher Rockwood and James E. Markham, as Alien Property Custodian of the United States was represented by his counsel, Victor E. Harr and Herman H. Hahner, Assistant United States Attorneys for the District of Oregon, thereupon oral and documentary evidence was introduced and the cause was argued to the Court by the respective parties and the Court having made and entered its findings of fact and conclusions of law, Now Therefore based upon these findings of fact and conclusions of law it is,

Ordered and Adjudged that this case be dismissed for want of jurisdiction.

Dated at Portland, Oregon, this 28th day of May, 1947.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 28, 1947. [62]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Kurt H. Koehler and William L. Brewster, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and Kurt H. Koehler in his in-

dividual capacity, the plaintiffs above named, hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the final judgment order, and the whole thereof, dismissing this action, which judgment was entered herein on the 28th day of May, 1947, by the above entitled court.

WILLIAM L. BREWSTER,
FLETCHER ROCKWOOD,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for Plaintiffs. [63]

Due and legal service of the within Notice of Appeal to Circuit Court of Appeals is hereby admitted at Portland, Oregon, this 22nd day of August, 1947.

/s/ VICTOR E. HARR,
Of Attorneys for Defendant
James E. Markham, as
Alien Property
Custodian.

Due and legal service of the within Notice of Appeal to Circuit Court of Appeals is hereby admitted at Portland, Oregon, this 22nd day of August, 1947.

/s/ R. R. MORRIS,
Of Attorneys for Defendant
The Bank of California,
National Association,
a National Banking
Association

Due and legal service of the within Notice of Appeal to Circuit Court of Appeals is hereby admitted at Portland, Oregon, this 22nd day of August, 1947.

/s/ H. J. WARNER, M

Of Attorneys for Defendant

The United States National
Bank of Portland

(Oregon), a National
Banking Association.

[Endorsed]: Filed Aug. 22, 1947. [64]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Plaintiffs herein, having lately filed their notice of appeal from the judgment order of this court to the Circuit Court of Appeals of the United States for the Ninth Circuit, hereby designate the following portions of the record and proceedings in this case to be contained in the Record on Appeal:

1. Complaint.
2. Defendant James E. Markham's motion to dismiss.
3. Answer of defendant James E. Markham.
4. Answer of defendant The United States National Bank of Portland (Oregon).

5. Answer of defendant The Bank of California, National Association.

6. Defendant James E. Markham's motion for judgment on the pleadings.

7. Stipulation amending defendant James E. Markham's answer.

8. Complete record of all proceedings on trial, including the testimony and evidence.

9. Memorandum of decision.

10. Findings of fact and conclusions of law.

11. Judgment order.

12. Notice of appeal to Circuit Court of appeals.

13. Designation of contents of record on appeal.

14. Statement of points upon which appellants will rely upon appeal.

WILLIAM L. BREWSTER,
FLETCHER ROCKWOOD,
HART, SPENCER,

McCULLOCH & ROCKWOOD,
Attorneys for Appellants.

State of Oregon,
County of Multnomah—ss.

Service of the within Designation of Contents of Record on Appeal is hereby accepted at Portland, Oregon, this 26th day of August, 1947, by receiving

a copy thereof, duly certified to as such by Hugh L. Biggs, of attorneys for Appellants.

/s/ VICTOR E. HARR,
Asst. U. S. Atty.,
Of Attorneys for Defendant
James E. Markham.

/s/ R. R. MORRIS,
Of Attorneys for The Bank of
California, National
Association.

/s/ H. J. WARNER, M
Of Attorneys for The United
States National Bank of
Portland (Oregon).

[Endorsed]: Filed Aug. 26, 1947. [66]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS WILL RELY ON APPEAL

The plaintiffs, having lately filed their Notice of Appeal from the judgment of this court to the Circuit Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the Record on Appeal, do hereby file their statement of points upon which they intend to rely upon appeal:

1. The District Court erred in deciding that such court is without jurisdiction to hear this case in that the United States has not decided to be made a co-defendant.

2. The District Court erred in rendering its judgment order dismissing this case for want of jurisdiction.

WILLIAM L. BREWSTER,
FLETCHER ROCKWOOD,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for Plaintiffs
and Appellants. [67]

State of Oregon,
County of Multnomah—ss.

Service of the within Statement of Points upon which Appellants Will Rely on Appeal is hereby accepted at Portland, Oregon, this 26th day of August, 1947, by receiving a copy thereof, duly certified to as such by Hugh L. Biggs, of attorneys for Appellants.

/s/ VICTOR E. HARR,
Asst. U. S. Atty.,
Of Attorneys for Defendant,
James E. Markham.

/s/ R. R. MORRIS,
Of Attorneys for defendant
The Bank of California,
National Association.

/s/ H. J. WARNER, M
Of Attorneys for defendant
The United States National
Bank of Portland
(Oregon).

[Endorsed]: Filed Aug. 26, 1947. [68]

[Title of District Court and Cause.]

DOCKET ENTRIES

1945

- Oct. 9—Filed complaint.
Oct. 9—Issued (2) summons—to marshal.
Oct. 11—Filed summons.
Oct. 22—Filed summons with marshal's return.
Oct. 29—Filed & entered order that Bank of Cal. &
U. S. Natl. Bank need not plead until
deft. Markham has filed answer. McC.
Oct. 29—Filed stipulation on above order.
Dec. 6—Filed motion of deft. for dismissal.
Dec. 13—Filed memorandum of defts. in support
of motion to dismiss complaint.

1946

- Jan. 3—Memorandum or Brief of plaintiffs to J.
McColloch on motion of alien property
custodian to dismiss.
Jan. 31—Brief of U. S. Atty. submitted to Judge
McColloch.
Feb. 4—Record of argument on motion of alien
property custodian to dismiss & order
taking same under advisement. McC.
Feb. 7—Entered order reserving motion of James
E. Markham, Alien Property Custodian,
to dismiss to time of pre-trial or trial.
Attys. notified. McC.
Feb. 7—Filed above order.
Mar. 29—Filed Answer of Deft. Markham.
Apr. 6—Filed Answer of Deft. U. S. Natl. Bank
of Portland.

1946

- May 1—Filed answer of deft. Bank of California.
- May 20—Entered order setting for pre-trial conference on Sept. 9, 1946. Attys. notified. McC.
- May 24—Entered order striking pre-trial conference & setting for call on Sept. 16, attys. notified. McC.
- Oct. 22—Entered order setting for pre-trial on Dec. 2, and trial on Dec. 10, 1946, attys. notified. McC.
- Nov. 7—Filed motion for judgment on the pleadings.
- Nov. 12—Filed stipulation for order to amend answer.
- Nov. 12—Filed & entered order amending answer. McC.
- Nov. 12—Entered order denying motion to continue motion for judgment on pleadings to time of pre-trial. McC.
- Nov. 15—Entered order continuing indefinitely deft's. motion for judgment on pleadings. McC.
- Nov. 22—Entered order striking from pre-trial calendar, notified attys. McC.
- Nov. 26—Entered order setting for pre-trial on Dec. 13, 1946, notified attys. McC.
- Dec. 13—Pre-trial hearing had. McC.
- Dec. 14—Entered order setting for trial on Jan. 23, 1947, 10 a.m. McC. [69]

1947

- Jan. 23—Record of trial before court & order taking under advisement. McC.
- Jan. 30—Filed memorandum of decision (dismissing for want jurisdiction).
- Mar. 17—Entered order allowing ptff. 2 weeks to prepare & submit brief & order setting aside memorandum decision on Jan. 30, 1947. McC.
- Mar. 19—Filed plaintiff's memorandum on effect of joinder of defendant banks on court's jurisdiction.
- May 2—Filed answering memorandum on behalf of Deft.
- May 8—Filed Reply to answer Memo. on behalf of Deft.
- May 22—Filed & entered Findings of Fact & Conclusions of Law, notices. McC.
- May 28—Filed & entered Judgment of Dismissal, notices. McC.
- Aug. 4—Filed judgment roll.
- Aug. 22—Filed notice of appeal by plntfs.
- Aug. 22—Filed bond on appeal. [70]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered

from 1 to 71 inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 2924, in which Kurt H. Koehler and William L. Brewster, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and Kurt H. Koehler in his individual capacity are plaintiffs and appellants and James E. Markham, as Alien Property Custodian, The Bank of California, National Association, a national banking association, and The United States National Bank of Portland (Oregon), a national banking association, are defendants and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellants and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of proceedings dated Jan. 23, 1947.

I further certify that the cost of comparing and certifying the within transcript is \$16.35 and that the same has been paid by appellants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 26th day of September, 1947.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy. [71]

In the District Court of the United States
for the District of Oregon

Civil No. 2924

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Plaintiffs,

vs.

JAMES E. MARKHAM, as Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Claude McColloch,
Judge.

Portland, Oregon, January 23, 1947

Appearances:

Mr. Fletcher Rockwood (Hart, Spencer, McCulloch & Rockwood), of Attorneys for Plaintiffs.

Mr. Victor E. Harr, Assistant United States Attorney, and Mr. Herman H. Hahner, Assistant United States Attorney, Attorneys for Defendant James E. Markham, as Alien Property Custodian.

Mr. John G. Gearin (Hampson, Koerner, Young & Swett), of Attorneys for The Bank of California, National Association.

Mr. H. J. Warner (Platt, Henderson, Warner, Cram & Dickinson), of Attorneys for Defendant The United States National Bank of Portland (Oregon).

Proceedings of Trial

The Court: Mr. Rockwood, are you ready to be heard?

Mr. Rockwood: The case was set for trial this morning, your Honor. Mr. Harr called me a few days ago and suggested that we stipulate the facts rather than call witnesses and, in general, I am agreeable to do that. I have had no time to prepare a stipulation myself. Mr. Harr showed me this morning a proposed stipulation. I have not had an opportunity to read it through.

As a matter of fact, under the pleadings, so far as the Government's answer is concerned, there are only two facts alleged in the complaint which are not admitted. One is the citizenship of the plaintiffs and I am prepared to prove that. It will take about five minutes to do that.

They have denied, for want of information and belief, the provisions of Paragraph XII of the complaint relating to the question of the trustees. I think that matter can be disposed of quickly. [2*]

The Government denies the allegations of Paragraph XVII of the complaint except the allegation that the plaintiff, Kurt H. Koehler, is the son of the decedent, Bertha Koehler. The remaining allegations are substantially allegations of the Oregon law to the effect that, if certain things happen, Kurt H. Koehler, as an heir at law, would have certain rights. The Oregon law is within the judicial knowledge of the Court, so I do not have evidence to present to support that allegation.

In the first place, I should say that the defendant, The Bank of California, and the defendant, The United States National Bank, deny certain of the allegations of the complaint for want of information sufficient to form a belief, but I have assurance, in letters from counsel for these two defendants, that they will withdraw their denials and that, at the trial, would admit the allegations of the complaint. I take it that still stands, Mr. Warner and Mr. Gearin?

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

Mr. Gearin: I would like to confer with you a moment on that. I was called into this case suddenly. I have not talked to Mr. Morris about it. I just want to clear up a few matters for my own particular satisfaction.

Mr. Rockwood: I have a letter from Mr. Morris stating that he will be prepared to admit at the trial the allegations of certain enumerated paragraphs of the complaint. I think that clears it so that we can try this case and make the [3] record, and for that purpose I would like to call, first, Mr. Koehler.

KUHT H. KOEHLER

one of the plaintiffs produced as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rockwood:

Mr. Rockwood: I will want to offer in evidence, with counsel's consent, a photostatic copy of the birth certificate of this witness as an exhibit, with permission to retain the original certificate, the original certified copy, in my files.

Mr. Harr: Yes.

Mr. Rockwood: I offer in evidence, as Plaintiffs' Exhibit No. 1, photostatic copy of the birth certificate of Kurt Koehler, certified by the proper officials of the State of Oregon.

The Court: Admitted.

(Testimony of Kurt H. Koehler.)

(Photostatic copy of birth record, Kurt Koehler, thereupon received in evidence and marked Plaintiffs' Exhibit No. 1.)

Q. (By Mr. Rockwood): Mr. Koehler, your full name is what?

A. Kurt Herman Koehler.

Q. You are one of the plaintiffs in this case against the [4] Alien Property Custodian?

A. Yes.

Q. You are a son of Bertha Koehler, deceased?

A. Yes.

Q. Have you at any time in your life resided in any state of the United States other than the State of Oregon? A. No.

Q. Have you at any time in your life resided in any other place in the world other than the state of Oregon?

A. Well, I have been in other places than the State of Oregon on trips, but not residence.

Q. But you have never established a residence other than in the State of Oregon, the City of Portland, State of Oregon? A. No.

Mr. Rockwood: That is all.

Mr. Harr: No questions.

(Witness excused.) [5]

WILLIAM L. BREWSTER

one of the plaintiffs herein, produced as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

Mr. Rockwood: I hand to Mr. Harr, for his examination, a certified copy of the Return of Births, being the Return of Birth of William Lewis Brewster, certified by the proper officials of the Department of Health, Philadelphia, Pennsylvania, and also a photostatic copy of the original and, with his consent, I offer in evidence, as Plaintiffs' Exhibit No. 2, the photosatic copy of the certificate.

The Court: Admitted.

Mr. Rockwood: This certificate shows William Lewis Brewster was born on August 2, 1866.

(Photostatic copy of Return of Birth in re William Lewis Brewster thereupon received in evidence and marked Plaintiffs' Exhibit No. 2.)

Direct Examination

By Mr. Rockwood:

Q. You are one of the plaintiffs in this case?

A. Yes.

Q. A member of the Bar of the State of Oregon?

A. Yes.

Q. You have practiced for many years at the Bar in Oregon? A. Yes. [6]

Q. Prior to practicing in Oregon, did you practice law in any other state or jurisdiction?

A. Well, I was admitted in New York and nominally entitled to practice there for five days, and then I came West.

(Testimony of William L. Brewster.)

Q. To Oregon? A. Yes.

Q. Will you please tell us what places in the United States you have resided in since your birth, what states?

A. Pennsylvania, Massachusetts, while I was in college, New York, New Jersey—I think that is the list.

Q. And Oregon? A. And Oregon.

Q. How long have you been a resident of the State of Oregon? A. Since 1891.

Q. Have you at any time in your life had a domicile or residence in any other place in the world outside of the United States of America?

A. No.

Q. You are familiar with the administration of the trust under the will of Bertha Koehler?

A. Yes.

Q. Which is in issue in this case?

A. Yes.

Q. As between you and Mr. Koehler, your co-trustee, who has been particularly responsible for the keeping of the accounts [7] of the trustees?

A. I have.

Q. You, of course, have read the complaint in this case, Mr. Brewster? A. Yes.

Q. You are familiar with Exhibit I, attached to the complaint, which purports to be a statement of the transactions of the trustees in the administration of this trust from the time of the distribution of the assets of the estate to the trustees to the time of the filing of the complaint in this case?

A. From August 1, 1944, to September 10, 1945.

(Testimony of William L. Brewster.)

Q. In that Exhibit I, attached to the complaint, a true statement of the account of the trustees between those two periods, those two dates?

A. It is.

Q. Between those two dates? A. It is.

Mr. Rockwood: You may cross-examine.

Cross-Examination

By Mr. Harr:

Q. As executor, one of the executors of this estate, you prepared and filed the final account, did you not, with the Probate Court in Multnomah County? A. Yes.

Q. In Multnomah County? [8] A. Yes.

Q. On the 18th day of July, 1944? A. Yes.

Q. You at that time petitioned the Court for distribution of the assets of this estate?

A. Yes.

Q. You petitioned the Court that they be transferred to you and Mr. Kurt Koehler as trustees?

A. Yes.

Q. The purpose of that trust, generally, was to keep that property, the half that was transferred to you—half was transferred, was it not?

A. Yes.

Q. The purpose of that was to keep that half for the benefit of a foreign national, to-wit Ilse Schloesser?

Mr. Rockwood: Objected to as calling for a conclusion of law. That calls for an interpretation of the will and the will, your Honor, will speak for itself.

(Question read.)

(Testimony of William L. Brewster.)

Q. (By Mr. Harr): Is that right?

A. Well, again, I am jumping at a legal conclusion. It was for the persons entitled to receive the trust fund by the terms of the will, and we interpreted that one way and you gentlemen interpreted it another.

Q. (By Mr. Harr): The will provided you should take that half—— [9] A. Yes.

Q. ——for the benefit of Ilse Schloesser? That is what the will provided, did it not?

Mr. Rockwood: I object to that, your Honor, as not the best evidence. The will speaks for itself. The provisions of the will have been admitted in the pleadings.

The Court: Sustained.

Q. (By Mr. Harr): You took that half, that 50 per cent, pursuant to the terms of the will?

A. Yes.

Q. And, pursuant to your petition, the Court did order distribution, did it not? A. It did.

Q. To you? A. Yes.

Q. For that purpose? A. Yes.

Q. I will ask you whether or not, before the distribution, you notified the Alien Property Custodian that you were asking for distribution?

A. No, we did not.

Q. Did the Alien Property Custodian consent in writing to the payment of this transfer and distribution?

A. The Alien Property Custodian paid no attention to such [10] request——

(Testimony of William L. Brewster.)

Q. I think you can answer that Yes or No. Did he give consent in writing to this transfer?

A. No.

Q. To this distribution? A. No.

Mr. Harr: At this time, if your Honor please, I wish to call the Court's attention to 8 Federal Register 1780. I would like to take this opportunity to read a portion of it to the Court.

The Court: Just tell me about it.

Mr. Harr: General Order 20——

The Court: Just state your point.

Mr. Harr: General Order 20 recites that no designated person shall take, transfer or distribute, or cause to be taken or transferred or distributed any property of any nature whatsoever to or for the benefit of any designated enemy country or designated national, unless there is, first, a written consent thereto—there is no alternative.

The Court: Where did you get that Federal Register? Do you keep one in your office?

Mr. Harr: We borrowed this out of your Honor's library this morning.

The Court: The answer is: It is not in your office.

Mr. Harr: We do have one down there, but we could not [11] find it. We are supposed to have them in a permanent volume and that particular volume has been absent, so we borrowed this one from the Court's library.

The Court: It is not reliable. I want you to know that I suppose what you found in there is

(Testimony of William L. Brewster.)

reliable, but I have never been able to keep one that is reliable. I was wondering.

Redirect Examination

By Mr. Rockwood:

Q. After the so-called distribution by yourselves as executors to yourselves as trustees, was the property at that time, or very shortly thereafter, insofar as it involved intangible property, placed in a blocked account with The Bank of California?

A. I didn't get that question.

Q. Shortly after the distribution by yourself as executors to yourselves as trustees, was the intangible personal property, exclusive of The United States National Bank stock, deposited in a blocked account with The Bank of California?

A. Yes, it was.

Q. Have you, since that time, ever had any access to that intangible personal property? Have you at any time had access to it? A. No.

Q. It has remained in the blocked account?

A. Except in a very limited way, when we were allowed to pay taxes out of the bank account, something of that kind. [12]

Q. With the consent of the Treasurer?

A. Yes.

Q. Except for that, there have been no transactions by you as trustees involving withdrawals or disposition of the property in the blocked account?

A. No.

Mr. Rockwood: I have no further questions.

(Testimony of William L. Brewster.)

Recross-Examination

By Mr. Harr:

Q. I have a question or two further. The Custodian, in correspondence with you, as late as the 28th of September, 1945, inquired about compliance with the vesting order, is that right?

A. I don't remember the date.

Q. Put it this way——

A. I assume you are right.

Q. Put it this way: The Custodian did not know, up until the time your complaint was filed in this case, that you would not comply, is that correct?

A. Well, must have been the complaint—I couldn't say.

Q. You filed the complaint on or about the 9th of October? A. Yes.

Q. 1945? A. Yes.

Q. You have a letter in your file, have you not, dated [13] September 28, 1945—perhaps a week or ten days before that—with reference to this matter, inquiring when compliance with the vesting order might be expected?

A. My mind is not fresh on the correspondence. I can't tell you that offhand.

Mr. Rockwood: You do not have your files with you? A. No, sir.

Q. (By Mr. Harr): But you do know you had correspondence with him up to the very time the complaint was filed? A. Yes.

(Testimony of William L. Brewster.)

Q. Has any of the property been transferred to the Alien Property Custodian? A. No.

Q. Physical possession has never been transferred to him? A. No.

Q. In connection with any of the property?

A. No.

Mr. Harr: That is all.

Mr. Rockwood: That is all, Mr. Brewster. Thank you.

(Witness excused.)

Mr. Rockwood: Mr. Warner, do you want to make any remarks concerning the pleadings?

Mr. Warner: I think it is appropriate at this time, your Honor, to confirm, for the purpose of the record, that which [14] Mr. Rockwood has already told you, that we have made certain admissions, and I will now formally state, in behalf of the defendant, The United States National Bank, that, notwithstanding the allegations of our answer, we now admit Paragraphs VII, VIII, X, XI, XII, XIII, XIV, XV and XVI of plaintiffs' complaint. That covers it, does it not, Mr. Rockwood?

Mr. Rockwood: That is right.

Mr. Warner: If it is also in order to so state, the defendant, The United States National Bank, has no evidence to offer.

Mr. Rockwood: Do you want to speak?

Mr. Gearin: For the sake of the record, The Bank of California, National Association, will admit Paragraphs VI, VIII, IX, X, XI and XVI

of the complaint, notwithstanding our answer which is on file. This is in accordance with Mr. Morris' letter to Mr. Rockwood under date of August 31, 1946.

Mr. Rockwood: The plaintiffs rest.

(Plaintiffs rest.)

Mr. Harr: The vesting orders having been pleaded by the plaintiffs and admitted by the defendants, the United States of America has, therefore, no evidence to be considered by the Court. The defendant, United States of America, has no testimony to introduce at this time.

(Testimony closed.) [15]

Mr. Rockwood: I know of nothing further, your Honor, which needs to be done except one thing. The matter has been argued substantially on the merits in connection with the motion of the Government to dismiss and the motion for judgment on the pleadings.

I did have a message from the Clerk—and I assume that other counsel have had a similar message—that you would like to have our comments on the case of the United States v. Sherwood, 312 U. S. 584.

In that case, there was a suit by a judgment creditor, by one who had a claim against the United States. The judgment creditor sued the United States directly under authority granted by a court in New York, under the New York statute allowing a judgment creditor to sue. The suit was brought under the Tucker Act.

The question substantially in that case was whether one who had no claim against the United States himself could sue in the District Court under the Tucker Act—could bring suit against the United States for a money judgment. Incidentally, the claim against the United States was some \$15,000 and the plaintiff in the cited case sued only for \$10,000, being the limit of the jurisdiction of the District Court under the Tucker Act.

I was somewhat at a loss to determine how that case was apropos here, but I assume the point your Honor had in [16] mind was this: Can these plaintiffs bring a suit against the United States under Section 9 of the Trading with the Enemy Act and, at the same time, join additional defendants—in this case, The Bank of California and The United States National Bank, to have adjudicated the rights of all three parties.

The Court: We have the same thing arising in suits that sailors are filing, or seamen in the Maritime Service. They have two choices, and one is to sue the Government in Admiralty. It was the custom for a while to join the agent who operated the ship. We all know the Maritime Commission ships were operated by men experienced in that business, under agency contracts with the Maritime Commission. That is what is raised here, whether the United States could be made a co-defendant.

Mr. Rockwood: Yes. In the Sherwood case the point was first made by the courts that the United States cannot be sued as a sovereign without its consent, and, of course, I would recognize that as a

basic principle and as the matter which we must meet. We say that the necessary consent of the United States to be sued is found in Section 9 (a) of the Trading with the Enemy Act.

The Court: In one of these briefs that came from Washington is the statement, as you may remember, that no place did the Government consent to be sued in injunction proceedings or for injunctive relief.

Mr. Rockwood: That is a point I want to make. The [17] jurisdiction of the Court of Claims and the jurisdiction of the District Court under the Tucker Act, as pointed out by the Court, is simply to render money judgments. The Court has no jurisdiction to do anything else and the Court in general reasoned that, if that be true, the Court does not have to adjudicate the rights of anyone—cannot adjudicate the rights of anyone in the Court of Claims other than a claim against the United States for money judgment.

The language of the Trading with the Enemy Act is positively and decidedly different. In Section 9 (a) it says: “* * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the District in which such claimant resides * * * to establish the interest, right, title, or debt so claimed.”

It specifically permits a suit in equity which I assume means a suit which has all the attributes of a suit in equity. It is not an action at law against the Government which is authorized by this Section

9. It is a suit in equity against the United States and, if it does not specifically state that the attributes of equitable jurisdiction shall apply, it does not satisfy the requirement. It does not specifically state necessary or proper parties may be brought in as in any suit in equity, but the very use of the language "suit in equity" brings into the Act all of the attributes of [18] equitable jurisdiction at the time of the passage of this section of the Act, and one of the attributes of equitable jurisdiction is injunctive relief, of course, and one of the attributes of equitable jurisdiction is that all controversies between several parties may be resolved in a single suit in which several parties are made defendants. I believe that the use, in the Trading with the Enemy Act, of the language "suit in equity" is sufficient to distinguish the case from all points which might otherwise be raised under the Sherwood case.

I might say this, that if we are wrong on that point the Court might properly—I say if we are wrong; I don't think we are—the Court might properly dismiss the suit as to The Bank of California and The United States National Bank, but we would still be entitled to all the relief we ask for against the Alien Property Custodian, and, if that should occur, and we got our decree against the Custodian but no decree against the other defendants to protect them if they want to turn the property over to us, we would simply have to bring another suit or possibly two suits, one against The United States National Bank to compel the transfer of the stock,

and one against The Bank of California to compel the turning over of the assets to the trustees to be administered under the supervision of the Court, as we ask in our prayer, so that it is not a basic question in the [19] lawsuit whether we are entitled to relief against them in this suit or not. However, I do believe that under the Act, which gives the Court jurisdiction to entertain a suit in equity against the United States, we are proceeding properly, that we have proceeded properly in enjoining these defendants in this first suit.

Mr. Harr: In the case of the United States vs. Sherwood, there seems to be an analogy, particularly I thing on Page 591: "That matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government."

Of course, this suit has been labeled a suit under Section 9, whereas the Government does not agree with that at all, as was fully and completely argued here before your Honor, so we take the position that it is not at all a case under Section 9 of the Trading with the Enemy Act.

The case not being one where the Government has consented to be sued—Section 9 also carries with it its own injunctive right—I was searching for that portion of the brief, your Honor. I don't find it.

The Court: It is just a short statement. It is to the effect that the Government is not consenting to

be sued injunctively. There are several citations, however. [20]

Mr. Harr: There is a part of it that refers to Section 9 carrying with it its own injunctive rights against the Custodian. I am not prepared on that point. The brief does cover that point, though, and sets forth in what respect the section does enjoin the Custodian.

Mr. Rockwood: It is that one sentence that provides what shall happen during the pendency of the litigation. Isn't that it?

Mr. Harr: I think that is correct.

Mr. Rockwood: That simply describes what shall occur while the litigation is pending. It does not restrict the power of the Court to grant final relief.

The Court: Page 7 of the brief which was filed December 13th, the Government's brief. I don't know if it was in the earlier or later Government's brief—there were three Government briefs.

Mr. Harr: I think the point that Mr. Jaffe had in mind in writing this brief was that there is a condition precedent to any action brought by a claimant, in law or in equity, that there must be an actual physical delivery and, as stated, in the Sherwood case, the Rules of Civil Procedure give the litigants no right whatsoever to enlarge upon or diminish the jurisdiction of the Court: The section itself sets out the limits.

The Court: Page 9 of one of the Government's briefs—whether it was the last one or not I don't know—contains a [21] sentence which caught my

eye. It begins on Line 21: "It need hardly be pointed out that the United States has not consented anywhere by any law to be sued for injunctive relief against the Alien Property Custodian. Section 9 (a) of the Trading with the Enemy Act imposes upon the Custodian its own injunctive restraint as to property in his actual physical possession and concerning only which suits are authorized."

I don't know how to decide this case; may never know how to decide it, but I will decide it very soon. There is nothing more to be submitted?

Mr. Harr: No, your Honor.

Mr. Rockwood: No, your Honor. [22]

[Title of District Court and Cause.]

CERTIFICATE

I, Ira G. Holcolmb, Court Reporter of the above-entitled Court, do hereby certify that on, to-wit, January 23, 1947, I reported in shorthand certain testimony and proceedings had in the above-entitled cause and court; that I thereafter caused my said shorthand notes to be reduced to typewriting and that the foregoing, consisting of pages numbered 1 to 22, both inclusive, constitutes a true, full and accurate transcript of said shorthand notes, so taken by me as aforesaid.

Dated at Portland, Oregon, this 10th day of September, 1947.

/s/ IRA G. HOLCOMB,
Court Reporter.

[Endorsed]: No. 11746. United States Circuit Court of Appeals for the Ninth Circuit. Kurt H. Koehler and William L. Brewster, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and Kurt H. Koehler in his individual capacity, Appellants, vs. James E. Markham, as Alien Property Custodian, The Bank of California, National Association, a national banking association, and The United States National Bank of Portland (Oregon), a national banking association, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed September 30, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

KURT H. KOEHLER and WILLIAM L. BREWSTER,, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustee under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Appellants,

vs.

JAMES E. MARKHAM, as Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANTS WILL RELY ON APPEAL

To the Clerk of the Above Entitled Court:

The Record on Appeal having been transmitted by the Clerk of the District Court to the Clerk of the United States Circuit Court of Appeals for docketing, the appellants submit herewith the statement of points upon which they intend to rely upon appeal:

1. The District Court erred in deciding that such court is without jurisdiction to hear this case in that the United States has not consented to be made a co-defendant.
2. The District Court erred in rendering its judgment order dismissing this case for want of jurisdiction.

/s/ WILLIAM L. BREWSTER,

/s/ FLETCHER ROCKWOOD,

HART, SPENCER, McCULLOCH
& ROCKWOOD,

Attorneys for Appellants.

Due and legal service of the within Statement of Points Upon Which Appellants Will Rely on Appeal is hereby admitted at Portland, Oregon, this 7th day of October, 1947.

/s/ VICTOR E. HARR,

Of Attorneys for Appellee James E. Markham, as
Alien Property Custodian.

/s/ R. R. MORRIS,

Of Attorneys for Appellee The Bank of California
National Association, a National Banking As-
sociation.

PLATT, HENDERSON, WARNER,
CRAM & DICKINSON,

By /s/ J. M.,

Of Attorneys for Appellee The United States Na-
tional Bank of Portland (Oregon), a National
Banking Association.

[Endorsed]: Filed Oct. 9, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL TO BE PRINTED

To the Clerk of the Above Entitled Court:

The Record on Appeal having been transmitted by the Clerk of the District Court to the Clerk of the United States Circuit Court of Appeals for docketing, the appellants hereby designate the entire transcript to be printed for inclusion in the printed transcript of record herein.

/s/ WILLIAM L. BREWSTER,
/s/ FLETCHER ROCKWOOD,
HART, SPENCER, McCULLOCH
& ROCKWOOD,
Attorneys for Appellants.

Due and legal services of the within Designation of Contents of Record on Appeal to Be Printed is hereby admitted at Portland, Oregon, this 7th day of October, 1947.

/s/ VICTOR E. HARR,

Of Attorneys for Appellee James E. Markham, as
Alien Property Custodian.

/s/ R. R. MORRIS,

Of Attorneys for Appellee The Bank of California
National Association, a National Banking As-
sociation.

PLATT, HENDERSON, WARNER,
CRAM & DICKINSON,

By /s/ J. M.,

Of Attorneys for Appellee The United States Na-
tional Bank of Portland (Oregon), a National
Banking Association.

[Endorsed]: Filed Oct. 9, 1947.

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Appellants,

v.

JAMES E. MARKHAM, as Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

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In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Appellants,

v.

JAMES E. MARKHAM, as Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

JURISDICTION

Appellants brought this suit on October 9, 1945, in the United States District Court for the District of Oregon (R. pp. 2-12) to establish their interest, right and title in and to the property vested in James E. Markham, Alien Property Custodian (hereinafter called the "Custodian") by his Vesting Order No. 4780.

Appellants are natural born citizens of the United States and reside in Portland, Multnomah County, Oregon, and neither of them has been or is now an enemy or an ally of an enemy of the United States (R. pp. 74, 93, 95). Jurisdiction in the United States District Court was based upon Section 9(a) of the Trading with the Enemy Act of October 6, 1917, as amended (hereinafter called the "Act") (50 U.S.C.A., Appendix Sec. 9(a)). Section 9(a) of the Act provides that any person not an enemy or an ally of an enemy may, after filing a prescribed notice of claim, institute a suit in equity in the District Court of the United States for the District in which the claimant resides "to establish the interest, right, title or debt so claimed . . ." Section 9(a) of the Act specifically provides that in such a suit the Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant. The prescribed notice of claim was filed by the appellants on October 1, 1945 (R. pp. 9, 63, 101).

The judgment of the District Court, entered on the 28th day of May, 1947 (R. p. 79), determined that the Court was without jurisdiction in that the United States has not consented to be made a co-defendant (R. pp. 73-79). Appellants appealed to this Court on the 22nd day of August, 1947 (R. pp. 79-81). Jurisdiction in this Court to hear the appeal is invoked under Section 17 of the Act (50 U.S.C.A., Appendix Sec. 17).

Pending the trial of this suit, the office of Alien Property Custodian was terminated by Executive Order No. 9788 (11 F.R. 11981) and all property or interests vested in or transferred to the Custodian, including the vested

property involved in this suit, have been transferred to and are now vested in the Attorney General of the United States and are now administered by him or under his control. By stipulation of appellants and appellees and by order of this Court this suit has been continued against Tom C. Clark, Attorney General of the United States, as successor in office of the Custodian, and the said Attorney General has been substituted as an appellee in the place and stead and as successor of the Custodian.

STATEMENT OF THE CASE

Bertha Koehler, herein called the decedent, a citizen of the United States, died on November 20, 1943, a resident of Portland, Multnomah County, Oregon. The decedent left a last will and testament and codicil thereto which were duly admitted to probate by the Circuit Court of the State of Oregon (in probate) and appellants were appointed and thereafter qualified as executors thereof (R. pp. 74, 75).

Pursuant to orders of the said probate court, appellants as executors delivered to themselves as trustees of a trust created by paragraph Third of the said will, as modified by said codicil, one half of the residue of decedent's estate (R. p. 75). One of the beneficiaries of said trust was and is Ilse Schloesser, who at the time of the issuance of the said Vesting Order No. 4780, was a "National" of a designated enemy country, Germany, within the meaning of Section 5(b) of the Act (R. pp. 7, 63, 101).

On or about September 22, 1944, appellants as said executors and trustees filed in the office of the Custodian a report on Form APC-3 (R. pp. 6, 63, 101). Subsequently, under date of March 30, 1945, the said Custodian made his Vesting Order No. 4780 (R. pp. 8, 45, 63, 69-70, 101) vesting the following described property (R. p. 45):

All right, title, interest and claim of any kind or character whatsoever of Ilse Schloesser, and her heirs and distributees, in and to the estate of Bertha Koehler, deceased, and under clause "Third" of the will of said Bertha Koehler, and paragraph (g) thereof per codicil dated July 11, 1933, including the right to demand from the executors of said estate and from the trustees under said will, payment and delivery of the principal and income of a certain trust fund, for which provision is made in said clause "Third" of said will and said codicil thereto.

On October 1, 1945, appellants filed with the Custodian a notice of their claim under oath relating to the property described in said Vesting Order upon the form prescribed by the Custodian and containing the particulars as required by the Custodian (R. pp. 9, 63, 101).

Rather than make an application to the President of the United States under Section 9(a) of the Act, appellants brought this suit under the provisions of said Section 9(a), to establish their interest, right and title in and to the vested property.

On September 27 and September 29, 1944 (prior to the issuance of the said Vesting Order), appellants as trustees under the will and codicil of decedent deposited with the appellee The Bank of California, National As-

sociation, in a blocked account personal property constituting assets of said trust. This deposit was made pursuant to an order of the said Circuit Court of the State of Oregon for Multnomah County and in accordance with Executive Order No. 8389 (C.C.H. War Law Service, paragraph 14,011) and General License No. 30-A (C.C.H. War Law Service, paragraph 14,333) (R. pp. 4, 63, 66, 69-71). A description of said assets is included in the complaint (R. pp. 5, 25). Upon the making of said deposit, the Federal Reserve Bank of San Francisco, California, issued to appellants as said trustees a license to carry on certain transactions with respect to said blocked account (R. pp. 5, 63, 69-71, 101). On April 23, 1945 (and subsequent to the issuance of said Vesting Order), the said Federal Reserve Bank revoked said license so far as Executive Order No. 8389 was concerned, and authorized appellants to engage in any transaction which might be engaged in if no National of any blocked country had any interest in the property involved (R. pp. 8, 63, 69-71, 101). Appellants have requested appellee The Bank of California, National Association, to deliver to them the assets of said trust so held in said blocked account, but the said appellee has refused to make such delivery in the belief that it was and is forbidden so to do by reason of the terms of the Act (R. pp. 8, 69-71).

The assets of the estate of the decedent distributable by appellants as executors to legatees included 475 shares of the capital stock of appellee The United States National Bank of Portland (Oregon). On July 18, 1944, the date said Circuit Court made its order of distribu-

tion in the estate of the decedent, said capital stock was registered in the stock record books of said appellee The United States National Bank of Portland (Oregon) in the name of the decedent. Appellants have requested said appellee to transfer said 237 shares of stock to appellants as said trustees, but said appellee has refused to transfer said shares in accordance with appellants' request in the belief that it is forbidden so to do by reason of the terms of the Act (R. pp. 6, 63, 67-68).

Appellant Kurt H. Koehler is the son of the decedent and contends in this suit that his rights under the said will and codicil of the decedent are as follows:

If appellant Kurt H. Koehler survives his sister, Ilse Schloesser, and the husband and all children and all lineal descendants of his sister, and if Ilse Schloesser survives her husband and all of her lineal descendants, and if Ilse Schloesser has died or shall die intestate, appellant Kurt H. Koehler will be the person entitled under the statute of the State of Oregon to take and receive all property of said trust; and appellant Kurt H. Koehler is consequently a contingent beneficiary of said trust and under the circumstances recited will be entitled to all of the principal and income of said trust. It is thus appellant Koehler's position that he as an individual, has a contingent interest in the trust property and that the Custodian had neither the right nor the power to vest said interest although by the said Vesting Order the Custodian did vest the interest of appellant Koehler as a possible "heir" of said decedent. Appellee Tom C. Clark, as successor of the Custodian, has denied this contention of appellant Koehler (R. pp. 9, 63).

The Custodian and the appellee Tom C. Clark, Attorney General of the United States, as the Custodian's successor, have consistently taken the position that the said Vesting Order vested the right to the immediate possession and control of the trust property and have demanded possession of said property (R. pp. 61, 77). Because of this position and because the appellants contend that the Vesting Order vests rights greater than those to which the Custodian and the appellee the Attorney General are entitled under the Act, the appellants brought this suit seeking a judgment or decree substantially as follows (R. pp. 10-12):

1. Establishing the right and title of the appellants as trustees of the said trust;

2. Declaring the said Vesting Order to be erroneous and to vest rights greater than the Custodian or the Attorney General has under the Act;

3. Declaring that the appellants' rights as trustees to hold and administer the said trust property are limited only to the extent that they shall be restrained, until it is otherwise determined by a court or competent governmental authority, from distributing to the said Ilse Schloesser or any person claiming through her who, at the time this suit was instituted was, or is at the time of the proposed distribution, an enemy alien as that term is defined under the Act or other applicable law of the United States;

4. Restraining the Custodian and the Attorney General as his successor from taking any action which would interfere with appellants' exercise of their rights as de-

scribed in paragraph 3 above;

5. Directing the appellee The Bank of California, National Association, to deliver to appellants as said trustees on demand the assets of the said trust held by said appellee;

6. Directing the appellee The United States National Bank of Portland (Oregon) to transfer to appellants as said trustees said 237 shares of the capital stock of said appellee;

7. Restraining the appellees from taking any action relating to the assets of said trust adverse to the interests of appellants until the rights and interests of appellants are determined and established.

The appellees The Bank of California, National Association, and The United States National Bank of Portland (Oregon) were named as defendants in this suit because, as hereinabove stated, they hold possession of and refuse to deliver to appellants, as trustees, part of the assets of said trust. Appellants contend that such refusal is not justified by the terms of the Act or the said Vesting Order and wrongfully interferes with their right and duty to administer the assets of the trust.

The case was tried to the Court on January 23, 1947 (R. p. 90). On May 22, 1947, the Court entered its findings of fact (R. pp. 73-77) and the following conclusions of law (R. p. 77):

"I.

"That this suit against the Alien Property Custodian is a suit against the United States.

“II.

“That this Court is without jurisdiction to hear this case, in that the United States has not consented to be made a co-defendant.”

Based upon these conclusions, the Court dismissed the case for want of jurisdiction (R. p. 79).

The sole question presented upon this appeal is one of law; that is, whether in this suit, under Section 9(a) of the Act, the Court is without jurisdiction because others than the Custodian (and the Attorney General as his successor) have been joined as defendants.

SPECIFICATIONS OF ERROR

1. The District Court erred in concluding as a matter of law that such Court is without jurisdiction to hear this case in that the United States has not consented to be made a codefendant.
2. The District Court erred in rendering its judgment order dismissing this case for want of jurisdiction.

SUMMARY OF ARGUMENT

1. Under the express language of the pertinent statute (50 U.S.C.A., Appendix, Section 9(a)), the United States has consented to be sued in equity and to be named as a codefendant in such a suit.
2. All the appellees have an interest in the subject matter of the suit and questions of law and fact are

common to all appellees. Accordingly, under the Federal Rules of Civil Procedure (28 U.S.C.A., following Section 723 (c)), and under general principles of equity, all the appellees were properly named defendants in this suit.

3. The pertinent decisions interpreting Section 9(a) of the Act hold directly or by necessary implication that the United States has consented to be a codefendant in a suit under Section 9(a) of the Act and that all persons interested in such a suit should be named defendants.

ARGUMENT

1. The express language of the statute authorizes a suit against the United States and others.

The statute upon which appellants rely in bringing and maintaining this suit is Section 9(a) of the Act. This section reads as follows:

“Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by

the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute *a suit in equity* in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery *by the defendant*, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit other-

wise terminated.” (50 U.S.C.A., Appendix, Section 9(a)) (*Italics ours*)

It is apparent that by express language the statute authorizes a suit in equity. It is equally apparent that Congress, not only by use of the words “suit in equity” but by other language of the section, has recognized that it may be necessary to name several defendants if a claimant under the section is to be able “to establish the interest, right, title or debt” claimed. To illustrate, the section does not provide that the Custodian or the Treasurer, as the case may be, shall be made *the* defendant. It provides, on the contrary, that the Custodian or Treasurer shall be made a party defendant. The use by Congress of the indefinite article indicates the legislative intent that there may be defendants other than the Custodian or Treasurer of the United States.

Further, Section 9(a) of the Act provides that a judgment or decree in favor of the claimant shall be “satisfied by payment or conveyance, transfer, assignment or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States . . .” The inclusion of the words “by the defendant” necessarily contemplates that there may be a defendant other than the Custodian or Treasurer.

It is of course true that

“Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Federal government is submitted to the courts for judicial determination, and the right to sue is limited to precisely those cases, both in regard to parties and the cause of action, as Congress may prescribe.”

54 Am. Jur., United States, Sec. 135, p. 643.

It is equally true, however, that in construing a statute authorizing a suit against the United States

“The act of Congress must be read ‘according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation’.”

Moore v. United States, 249 U.S. 487, 39 S. Ct. 322, 323 (1919).

While a statutory waiver of sovereign immunity is to be strictly construed, Congressional adoption of broad statutory language authorizing suits against the United States is not to be thwarted by an unduly restricted interpretation. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 65 S. Ct. 639, 643 (1945).

In view of the plain language of the statute and the obvious purpose of Congress to afford claimants thereunder an opportunity to obtain complete relief by a suit in equity, it can hardly be urged that Congress has not authorized the sovereign to be made a co-defendant in such a suit.

2. Under the Federal Rules of Civil Procedure and general principles of equity, all the appellees are necessary or proper parties.

As explained in the Statement of the Case, the Custodian and appellee Tom C. Clark, Attorney General of the United States, as the Custodian's successor, have consistently maintained that the Vesting Order vested

the right to the immediate control and possession of the trust property, and both the Custodian and the Attorney General have demanded possession of said property. Appellants insist that they have the right to possession and control of the trust property and one of the purposes of this suit is to establish that right. The appellee The Bank of California has refused to deliver to appellants assets of the trust which have been deposited in a blocked account with the said appellee. This refusal is based upon said appellee's belief that the Act prohibits such a delivery. One of the purposes of this suit is to determine whether, notwithstanding the Vesting Order and the provisions of the Act, the appellants are entitled to control, possess and administer the trust assets.

In its affirmative answer, the appellee The United States National Bank of Portland (Oregon) has alleged that if the appellants obtain and deliver to said appellee a proper license issued pursuant to General Order 20 of the Custodian (C. F. R., Title 8, Chapter 2, Part 503, Section 503.7), said appellee will deliver to "such persons as are then legally entitled to receive them" the 237 shares of stock of said appellee which are a part of the trust assets (R. p. 67, 68).

General order 20 provides, in effect, for the issuance by the Custodian of a license authorizing a transfer by executors and trustees under a will, of property for the benefit of an enemy national. As the Custodian and his successor, the Attorney General, contend that the assets of the trust must be delivered to them pursuant to the Vesting Order, it is obvious that the appellants can not obtain a license under General Order 20. Furthermore,

the Attorney General insists that he is the person "legally entitled to receive" the above-mentioned shares of stock, whereas the appellants contend in this suit that they are such persons.

From the foregoing summary of the claims of appellants and the several appellees, it is clear that all parties have an interest in the subject matter of this suit. Accordingly, appellants contend that under the Federal Rules of Civil Procedure and under general principles of equity all the appellees are necessary or proper parties.

The Federal Rules are generally applicable to the United States. *United States v. General Motor Corporation, et al.*, (N.D. Ill. E.D. 1942), 2 Fed. R.D. 528, 530.

As stated in 1 Moore's Federal Practice, Sec. 1.05, p. 49:

"The Federal Rules apply to actions in the district court to which the United States or a state is a party. This is clearly revealed by the fact that Rule 81 makes no exception for such cases, while Rule 4 prescribed the method of serving summons upon the United States and a state, and Rule 12(a) gives the United States 60 days to defend."

In *United States v. Sherwood*, 312 U.S. 584, 61 S. Ct. 767 (1941), the United States Supreme Court implied that the Rules are applicable, within limits, to actions against the United States under the Tucker Act (28 U.S.C.A., Sec. 41 (20)). In this case *Sherwood*, a creditor (under a New York state court judgment) of one Kaiser, brought an action against the United States and Kaiser for damages claimed to be due Kaiser upon the latter's contract with the Government. The New

York state court had made an order authorizing Sherwood, as judgment creditor, to maintain an action under the Tucker Act, to recover the damages due Kaiser and to apply the recovery to payment of the judgment against Kaiser. Kaiser and the United States were accordingly made defendants. The Circuit Court of Appeals for the Second Circuit held that the question of joinder was procedural and that under the Federal Rules the action could be maintained against both parties. The Supreme Court, however, held that the problem was one of jurisdiction and that the jurisdiction of the district courts under the Tucker Act is limited strictly to suits which could be brought in the Court of Claims, which court does not have jurisdiction to entertain a suit against a defendant other than the United States. With respect to the general application of the Federal Rules to district court actions under the Tucker Act, the court used the following language, which implies that the rules are applicable with respect to such actions:

“But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C., Sec. 723b; 28 U.S.C.A., Sec. 723b, authorizing this Court to prescribe the rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.” (p. 771)

After noting that suits cannot be brought in the Court of Claims against any defendant other than the United States and that the jurisdiction of district courts under the Tucker Act is concurrent with that of the Court of Claims, the court said further:

“The matter is not one of procedure but of jurisdiction whose limits are marked by the Government’s consent to be sued. That consent *may be conditioned*, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, which prescribe the methods by which the jurisdictions of the federal courts is to be exercised, but do not enlarge the jurisdiction.” (Italics ours) (p. 772)

Holding that the Federal Rules apply to cases against the United States under the Tucker Act, this Court has stated:

“Rule 1 of the Federal Rules of Civil Procedure declares that ‘These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.’ Cases under Sec. 24 (20) of the Judicial Code, 28 U.S.C.A., Sec. 41 (20), are cases of a civil nature and are not within any of the exceptions stated in Rule 81. Hence these rules govern the procedure in such cases in so far as applicable and not inconsistent with Secs. 5, 6, 7 and 10 of the Tucker Act, 28 U.S.C.A., Secs. 762-765.”

United States v. Gallagher, et al., (C.C.A. 9, 1945) 151 F. (2d) 556, 557.

If the Rules apply, generally, to suits against the United States under the Tucker Act, then by analogy they apply to suits under Section 9(a) of the Act in the absence of any statutory language in the Act indicating a contrary intention. Appellants submit that under the Federal Rules the United States was properly made a co-defendant.

Under Rule 19, necessary and indispensable parties must be joined as plaintiffs or defendants. Quoting *Shields v. Barrow*, (1854) 17 How. 130, 15 L. Ed. 158, 160, one text states the following as the most often cited principle for determining who are necessary and indispensable parties:

“ ‘Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights in it . . . are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and in good conscience’ are indispensable parties.” 2 Moore’s Federal Practice, pp. 2144, 2145.

Although it might be argued that the two banks are not indispensable parties under Rule 19, certainly they are proper parties under Rule 20(a), which reads:

"Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

As stated in 2 Moore's Federal Practice, p. 2183:

"Aside from restrictions of jurisdiction and venue, Rule 20 places but one restriction upon permissive joinder of parties. There must be a common question of law or fact."

The effect of the Federal Rules is well stated in *United States v. American Surety Co. of New York** (D.C., E.D., New York, 1938), 25 Fed. Supp. 700:

"The new rules of procedure are designed to enable the disposition of a whole controversy such as this at one time and in one action, provided all parties can be brought before the Court and the matter decided without prejudicing the rights of any of the parties. There is nothing presently apparent

*Note: On the question of joinder of parties in a suit under the Tucker Act this case is contrary to *United States v. Sherwood*, supra. (See *New Amsterdam Casualty Co. v. United States*, (D.C., W.D., Pa., 1947) 71 Fed. Supp. 155, 156).

which would substantially prejudice the rights of anyone if these various claims are heard together.” (p. 701)

There is nothing apparent in this suit which would substantially prejudice the rights of anyone if the claims of appellants and various appellees are heard together.

The Federal Rules govern, of course, suits in equity as well as actions at law and provide for a single form of action known as a civil action. (Rules 1 and 2, Federal Rules of Civil Procedure following Section 723(c)); 3 Ohlinger’s Federal Practice, pp. 4, 5. However, the merging of legal and equitable procedure in the new rules had no effect upon substantive legal rights, and the courts must still apply equitable principles to equitable rights and legal principles to legal rights.

As stated in *Monks v. Hurley* (D. C.D., Mass. 1942), 45 Fed. Supp. 724:

“The new rules of procedure have abolished the distinction between legal and equitable forms of action. Rule 2, Federal Rules of Civil Procedure. However, the distinction which has been abolished is a procedural and not a substantive one. 1 Moore’s Federal Practice, p. 144; 17 Hughes, Federal Practice, Sec. 18563; *Bellavance v. Plastic-Craft Novelty Co.*, D.C., 30 F. Supp. 37, 39; *Grauman v. City Company of New York*, D.C., 31 F. Supp. 172, 173, 174. Where the subject matter of a civil action is such as would be cognizable exclusively in equity under the old practice, and therefore governed by equitable principles, such principles would be equally applicable to such an action today. The new rules have not abrogated equitable doctrine. . . .” (p. 728)

It is hardly necessary to cite authorities in support of the proposition that in equity all persons having any interest in the suit should be joined either as parties plaintiff or defendant in order that complete relief may be granted. See 39 Am. Jur., Parties, Sec. 36, pp. 903, 905.

As stated in one of the early United States Supreme Court decisions, it is a rule of Chancery that all those against whom a decree can be made shall be brought before the court if they are within its jurisdiction. *Breedlove v. Nicolet*, 32 U.S. 413, 8 L. Ed. 731 (1833).

In equity all persons having an interest in the question to be tried are made parties that the decree may be final as to all matters in litigation. *Thompson v. Roberts*, 65 U.S. 233, 24 How. 233 (1860).

This court has carefully considered the question of parties to equitable suits in *Chicago, M., St. P. & P. R. Co. v. Adams* (C.C.A. 9, 1934), 72 F. (2d) 816, where a suit was dismissed because certain county officers had not been made defendants. Commenting on the question of indispensable parties, the court said:

“An early and able discussion of the entire question of indispensable parties is to be found in the following oft-quoted passage from the opinion of Mr. Justice Curtis in *Shields v. Barrow*, 17 How. (58 U.S.) 130, 139, 15 L. Ed. 158. After quoting from *Russell v. Clarke's Executors*, 7 Cranch, 98, 3 L. Ed. 271, the learned jurist continued: ‘The court here points out three classes of parties to a bill of equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court

may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience'.

* * * * *

" 'The general rule in equity is that all persons materially interested, *either legally or beneficially*, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. . . . '

"Nor is it necessary that the officer's rights be 'injuriously affected' by the court's decree. In *Davis v. Henry*, (C.C.A. 6) 266 F. 261, 266, the court said: 'The test of indispensability is not whether the decree is bound to injuriously affect the rights of the absent party; it is enough that such absence may

“leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience.” ’ ’ (pp. 818-819)

The court found that the officers had a definite legal, if not a beneficial, interest in the subject matter of the suit, and hence should have been made defendants. Here the appellee banks claim the right to possession of a portion of the assets of the trust and hence they have a definite legal interest in the subject matter of this suit. Accordingly, under the general principles of equity all of the appellees have a legal or beneficial interest in the subject matter of the suit and therefore are necessary or proper parties.

If the two appellee banks cannot be joined with the United States as defendants in this suit, the appellants will be required to institute separate suits to compel the banks to deliver the above mentioned assets of the trust to the appellants and to restrain any other disposition of such assets until this suit has been determined. Equity, of course, has jurisdiction to avoid a multiplicity of suits. *Matthews v. Rodgers*, 284 U.S. 521, 52 S. Ct. 217, 221 (1931).

In *Lake Charles Rice Mill Co. v. Pacific Rice Growers' Ass'n* (C.C.A. 9, 1924), 295 Fed. 246, 250, certiorari denied 266 U.S. 602, 45 S. Ct. 90, this Court quoted with approval the following language from *Wyman v. Bowman*, 127 Fed. 257, 263:

“This court has repeatedly held—and that holding is sustained by the great weight of authority—that a bill in equity against several defendants separately liable either at law or in equity may be

maintained, in order to avoid a multiplicity of actions at law or of suits in equity, whenever there is a common and decisive point of litigation between the complainant and the defendants, the complainant has no remedy at law as prompt, practical, and efficient to attain the ends of justice as the suit in equity, and the convenience of the complainant in pursuing the single suit in equity is not overcome by the deeper inconvenience of such a course to the defendants."

There is a common and decisive point of litigation between the appellants and appellees, viz., the validity of the Vesting Order and the right of appellees to withhold from the appellants possession of the trust res. Hence, under the multiplicity of suits doctrine this suit is maintainable against all the appellees.

3. The decisions under the Trading with the Enemy Act hold that the United States has consented to be sued under Section 9(a) as a codefendant.

In *Pilger v. Sutherland* (C.A., D.C. 1932), 57 F. (2d) 604, the British property trustee (holding an official position similar to that of the American Alien Property Custodian) sued the Alien Property Custodian *and others* under Section 9(a) of the Trading with the Enemy Act to establish rights in shares of stock of American corporations then held by the American Custodian. Pilger and others intervened, asserting ownership of a part of the shares of stock which the British trustee was seeking to recover. The main suit by the British trustee was dismissed by agreement without prejudice to the continuance of the suit as between the several defend-

ants and the interveners. Later a motion to dismiss the intervening complaint was duly filed upon the grounds, among others, that there was a nonjoinder of indispensable parties. On the question of joinder the court said:

“One other point remains to be noticed. It is that the bill is defective because of nonjoinder of necessary parties. *Undoubtedly all parties claiming the shares of stock held by the Custodian are necessary parties and must be joined in any litigation affecting the right to the property.* If they cannot legally be made parties, the suit cannot proceed, but we think that section 105 of the District Code (1924), D. C. Code 1929, T. 24, Sec. 378, covers just such a case as this. It declared that publication or personal service of process outside the District may be had against a nonresident in any suit involving a claim or demand to or against any real or personal property within the jurisdiction of the court. There can be no doubt, we think, that the shares of stock which appellants claim were within the jurisdiction of the lower court because they were held by the Alien Property Custodian in Washington in the District of Columbia, and we think that the quoted provision of the Code gave the court complete jurisdiction to assemble all the necessary parties to the end that the right and title to the property might be finally determined. This is what we decided in *Jones v. Rutherford*, 26 App. D. C. 114, and repeated recently in *Doerschuck et al. v. Mellon*, 60 App. D. C. 383, 55 F. (2d) 741, decided December 21, 1931.

“We think, therefore, that the plea to the jurisdiction should be overruled, and since, as we have already indicated, the bill shows an equitable title to the shares of stock which are the subject of dispute, we *think the case is one for a court of equity rather than a court of law. Besides, the act of Congress (supra), section 9(a) so provides.*” (Italics ours) (p. 607)

A decree of the Supreme Court of the District of Columbia dismissing the bill was reversed with instructions to reinstate the bill with leave to intervenng defendants to amend by adding necessary parties. The holding of the court was that all persons claiming the particular shares involved were *necessary* parties. In the case at bar if plaintiffs had failed to join the two banks as defendants, the complaint, under the authority of the *Pilger* case, might have been vulnerable to a motion to dismiss for such nonjoinder. The case is direct authority for the proposition that if others than the Custodian are joined as defendants the court has jurisdiction under Section 9(a) of the Act.

On the question of proper parties in a suit under Section 9(a), the *Pilger* case was cited with approval in *Alley v. Clark, Attorney General* (E.D. N.Y. 1947), 71 Fed. Supp. 521. In the *Alley* case the plaintiff brought suit against the Attorney General as successor to the Custodian to establish the plaintiff's interest as a limited partner in certain vested partnership assets. Holding that the suit was subject to dismissal because the remaining partners were indispensable parties, the court said (p. 528):

"if plaintiff truly has an interest, right or title in the property, then his co-owners are indispensable parties, . . ."

The case of *Jackson, Attorney General, v. Irving Trust Co.*, 311 U.S. 494, 61 S. Ct. 326 (1940), involved a suit under Section 9(a) of the Act against the Custodian and *other defendants*, including a German corporation termed "Z.E.G." Plaintiffs sought to establish

a debt owing to a partnership by Z.E.G. and to have applied in payment thereof a sum which had been seized as enemy property by the Custodian. The corporation Z.E.G. answered, setting up affirmative defenses. The Custodian and the Treasurer of the United States appeared generally and moved to dismiss the bill on the grounds (a) that it affirmatively appeared from the bill that no debt was owing to plaintiff from any enemy whose property had been seized and was then held, (b) that it affirmatively appeared that no debt was owing to plaintiffs by Z.E.G., and (c) that the plaintiffs had not stated facts to entitle them to equitable relief under the provisions of the Act. The Attorney General, the successor to the Custodian, petitioned the Supreme Court to set aside the judgment of the lower court on the ground that the beneficial owner of the claim was an enemy and that the lower court therefore lacked jurisdiction to enter a judgment. On the question of jurisdiction of the federal courts to entertain suits under Section 9 of the Act, the Supreme Court said as follows:

“Petitioner argues that the judgment was void since it was not authorized by the Trading with the Enemy Act and thus the suit was a suit against the United States to which the United States had not consented and over which, therefore, the District Court had no jurisdiction.

“We hold the argument untenable. There is no question here of the sort presented in *United States v. United States Fidelity & Guaranty Company*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894, of want of consent to be sued or of an attempt on the part of officials to waive the sovereign immunity. The United States had expressly consented in Section 9(a) of the Trading with the Enemy Act that suits

might be brought by a non-enemy claimant to have his claim against an enemy debtor satisfied out of the latter's property held by the Alien Property Custodian. The pertinent parts of the section are set forth in the margin.

"The statute provides that any person not an enemy or ally of enemy 'claiming' any interest or right in the property seized or to whom any debt may be owing by the alien enemy may sue the Custodian and Treasurer. He may sue 'to establish the interest, right, title, or debt so claimed'. The court is to determine whether his claim is established. If the claim is 'so established', the court is to order the delivery of property or payment 'to which the court shall determine said claimant is entitled'. *Nothing could be clearer than that in a suit so brought the court is to determine every issue necessary to the establishment of the claim.*

"The suit in question was precisely within the terms of the Act. It was a suit by plaintiffs Sorenson and Nielsen as surviving partners, in which they alleged their citizenship and residence in the United States (and this does not now appear to be questioned), to recover a debt claimed to be owing to the firm by an enemy corporation. The allegations of the bill of complaint met the requirements of the statute in every respect. It set forth the plaintiffs' claim, their non-enemy status, the transactions out of which their claim arose, and that they had given notice of the claim as the statute required. The denials of the answers and the affirmative defenses presented issues which the court was competent to try. All these issues were necessarily before the court in the performance of its statutory duty to determine whether the plaintiffs had established their claim to the debt. Thus, the status of the plaintiffs, of the partnership, and of Sieckken, the deceased partner, the effect of his death, his interest in the assets under the partnership agreement, the nature of the transactions with Z.E.G., whether it

was indebted to the firm and whether the surviving partners were entitled to recover the debt, that is, every issue which could be litigated in the suit was by the very terms of the Act submitted to the determination of the court." (*Italics ours*) (pp. 328-330)

In the cited case there was a joinder of defendants other than the Custodian, and the court specifically held that the suit was properly brought under Section 9(a) of the Act and that the lower court had jurisdiction. If in the opinion of the court there was a lack of jurisdiction because of the joinder of the other defendants, the objection would normally have been raised by the court on its own motion. *Matthews v. Rodgers*, *supra*.

We have found no case which holds that a suit under Section 9(a) of the Act must be brought against the Custodian as the sole defendant.

CONCLUSION

During the trial of this case, the District Court indicated that under the rule of the *Sherwood* decision, *supra*, the Court was without jurisdiction in that the United States has not consented to be made a co-defendant in a suit under Section 9(a) of the Act, and we believe the District Court's order dismissing this suit was influenced by the *Sherwood* case (R. pp. 102-108). But the jurisdiction of the Court of Claims and the District Court under the statute involved in the *Sherwood* case was restricted to the adjudication of issues between the claimant and the Government and such courts have no jurisdiction to entertain a suit which would require

the determination of rights between parties other than the United States. The jurisdiction of the District Courts under Section 9(a) of the Act is not so restricted, and, indeed, the Act on its face in almost specific terms permits the joinder of defendants other than the Custodian.

Appellants respectfully submit that under Section 9(a) of the Act, the United States has consented to be made a co-defendant and that the District Court erred in dismissing this suit for want of jurisdiction.

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**KURT H. KOEHLER AND WILLIAM L. BREWSTER, AS
EXECUTORS OF THE LAST WILL AND TESTAMENT AND
CODICIL THERETO OF BERTHA KOEHLER, DECEASED, AND
AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT
AND CODICIL THERETO OF BERTHA KOEHLER, DECEASED,
AND KURT H. KOEHLER IN HIS INDIVIDUAL CAPACITY,
APPELLANTS**

v.

**JAMES E. MARKHAM, AS ALIEN PROPERTY CUSTODIAN,
THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
A NATIONAL BANKING ASSOCIATION, AND THE UNITED
STATES NATIONAL BANK OF PORTLAND (OREGON),
A NATIONAL BANKING ASSOCIATION, APPELLEES**

**BRIEF FOR TOM C. CLARK, AS SUCCESSOR TO THE ALIEN
PROPERTY CUSTODIAN, APPELLEE**

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11746

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AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT
AND CODICIL THERETO OF BERTHA KOEHLER, DECEASED,
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A NATIONAL BANKING ASSOCIATION, APPELLEES**

**BRIEF FOR TOM C. CLARK, AS SUCCESSOR TO THE ALIEN
PROPERTY CUSTODIAN, APPELLEE**

STATEMENT

This is an appeal from a decision of the District Court for the District of Oregon dismissing a complaint for want of jurisdiction. The complaint was brought under Section 9 (a) of the Trading with the Enemy Act (40 Stat. 419, as amended, 50 U. S. C. App. Sec. 9 (a)). The plaintiffs-appellants here are Kurt H. Koehler and William L. Brewster, the

trustees of a testamentary trust established by the late Bertha Koehler. The defendants named in the complaint were the Alien Property Custodian and two banks—the United States National Bank of Portland (Oregon) and the Bank of California National Association. On October 16, 1947, Tom C. Clark, the Attorney General, succeeded to the functions of the Alien Property Custodian and he has been substituted as appellee in this court for the Custodian.¹

There is no dispute over any of the material facts. Bertha Koehler died in Portland, Oregon, on November 20, 1943 (R. 74). Her will provided that one-half of her residuary estate should be held by the plaintiffs in trust for one Ilse Schloesser, a German national (R. 17). In September 1944, the plaintiffs, who were also executors of her estate, paid to themselves, as trustees, the property to be held in trust (R. 75). A portion of that property has remained in their hands; another portion was deposited by them in a blocked account in the defendant Bank of California; a third portion consists of certain shares of capital stock of the defendant United States National Bank, registered in the name of the decedent, Bertha Koehler.

On March 30, 1945, the Alien Property Custodian vested the right, title and interest of Ilse Schloesser in the trust (R. 45). The vesting order described the property vested as the right, title and interest of “Ilse Schloesser, and her heirs and distributees” so that

¹ In this brief, the term “Custodian” will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

the interests which Mrs. Schloesser had been given by the decedent would vest in the Custodian even if Mrs. Schloesser were dead at the time of the order. It is now agreed in this proceeding that she was alive when the vesting order was issued (R. 7). The order specifically included among the rights of Ilse Schloesser which were vested, the right granted by the decedent's will to demand payment of the trust corpus. No action has been taken by the Custodian to require the trustees or the banks to pay over the trust corpus to him.

The complaint alleged the facts stated above and also alleged that Kurt Koehler, one of the trustees, was a brother of Ilse Schloesser and might, under the terms of the trust, be entitled in the future to a portion of the trust property (R. 9). The Alien Property Custodian and the two banks were named as defendants.

The relief asked by the complaint was:

1. That the right and title of the plaintiffs as trustees of the trust be "established" (R. 10).

2. That the vesting order be declared to be "erroneous" in that:

- (a) the Custodian had no right to vest the right, title and interest of the "heirs and distributees" of Ilse Schloesser (R. 10).

- (b) Ilse Schloesser had no right to demand the trust corpus (R. 10).

- (c) the property vested was not "payable or deliverable" to or "owned or controlled" by Ilse Schloesser (R. 10, 11).

3. That the plaintiffs be declared to be entitled to administer the trust and to collect fees therefor, limited only by a restraint against payment to Ilse Schloesser if she is "at the time of such proposed distribution an enemy alien" (R. 11).

4. That the Custodian be enjoined from interfering with the plaintiffs' rights as trustees (R. 12).

5. That the defendant Bank of California be authorized and directed to transfer to the plaintiffs, as trustees, the trust property held by them (R. 12).

6. That the defendant United States National Bank be authorized and directed to transfer to the plaintiffs, as trustees, the shares of stock standing in the name of the decedent (R. 12).

7. That all of the defendants be restrained from taking any steps relating to the trust property until the rights of the plaintiffs were settled (R. 12).

The Custodian moved to dismiss this complaint on the grounds that it failed to state a cause of action and that no statute authorized a suit against the Custodian for a declaration of rights (R. 61). When this motion was taken under advisement the Custodian filed an answer which reiterated these objections (R. 63) and moved for judgment on the pleadings (R. 71). This motion was also taken under advisement and the case was tried. At the trial the only material facts established were the citizenship and residence of the plaintiffs.

On May 22, 1947, the District Court filed its findings of fact and conclusions of law (R. 73 ff). The court found the facts as stated above and concluded that, the suit being a suit against the United States,

the court had no jurisdiction "in that the United States has not consented to be made a co-defendant" (R. 77). On August 22, 1947, the plaintiffs appealed to this court (R. 79).

STATUTES INVOLVED

The pertinent portions of the statutes principally involved are set forth in the Appendix.

QUESTION PRESENTED

Whether the District Court had jurisdiction over a suit against the Alien Property Custodian to establish rights in a trust *res* which was not vested by the Custodian and has not come into his possession.

SUMMARY OF ARGUMENT

The only property vested or held by the Alien Property Custodian is the interest of Ilse Schloesser in the trust, ~~owned~~. The complaint here does not seek to obtain a return of that property or to establish any interest in it. It is therefore not within the terms of the consent of the United States to suit embodied in Section 9 (a) of the Trading with the Enemy Act and the District Court was without jurisdiction.

ARGUMENT

The court below dismissed the complaint because "the United States has not consented to be made a co-defendant" (R. 77). The appellants have construed this dismissal as resting solely on the joinder of third parties with the United States as defendants (see *United States v. Sherwood*, 312 U. S. 584 (1941)). Their brief, accordingly, is addressed to the proposi-

tion that the joinder of the defendant banks was permissible under Section 9 (a) of the Trading with the Enemy Act. Proof of that proposition, however, is not sufficient to show that the District Court erred. It must first be shown that the United States has consented to be made a defendant. Unless such consent has been given the District Court had no jurisdiction quite apart from any question of joinder, and its dismissal of the complaint was correct.

We believe that the relief sought against by the Custodian by the complaint in this case was not within the scope of the Government's consent to be sued under the Trading with the Enemy Act. This, in our view, is the major issue in the case. It is the issue which the Custodian raised in the court below by his motion to dismiss the complaint (R. 61), and his answer (R. 64), and it is the issue on which he asked the Court to rule in his favor after the trial was completed (R. 106). The issue as to joinder is secondary and need only be reached if it is first found that this suit is within the scope of the Government's consent to be sued. Since we think it quite clear that this suit is not within the scope of that consent we think it would be superfluous to respond to the appellants' arguments on the joinder question and we have not done so in this brief.

I. A suit against the Custodian is a suit against the United States and may not be maintained unless the United States has given its consent

The Alien Property Custodian is an officer of the United States. As an officer of the United States he may bring suit in a Federal district court under

Section 24 (1) of the Judicial Code (28 U. S. C. 41 (1) to protect and define his interests in property, an authority further confirmed by Section 17 of the Trading with the Enemy Act (50 U. S. C. App. Sec. 17). *Markham v. Allen*, 326 U. S. 490 (1946).

But, like other officers of the United States, the Custodian may not be sued in his official capacity unless the United States has consented. The United States may not be sued unless specific permission for the suit is shown.

The United States, as sovereign, is immune from suit save as it consents to be sued * * *, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit (*United States v. Sherwood*, 312 U. S. 584 (1941)).

It is well settled that this doctrine is applicable to the Custodian and that a suit against him may be heard only if that suit is within the terms of the permission granted by Congress. *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591 (1924); *Pflueger v. United States*, 121 F. 2d 732, 736 (App. D.C., 1941) cert. den. 314 U. S. 617; *Cummings v. Hardee*, 102 F. 2d 622 (App. D.C., 1939), cert. den. 307 U. S. 637. This doctrine is not harsh, since, as we shall show, the Trading with the Enemy Act provides an adequate remedy for those having claims against the Custodian. But it does require that the orderly procedure prescribed by the Act be complied with in adjudicating those claims.

The appellants concede the applicability of this doctrine here. Correctly assuming that the only authority for a suit against the Custodian is that

provided in Section 9 (a) of the Trading with the Enemy Act (50 U. S. C. App. Sec. 9 (a)), they go on to assume that this suit falls within the scope of that section (App. Br., p. 10 ff.). We believe that it does not and we therefore believe that the District Court was correct in dismissing the complaint for want of jurisdiction.

II. This suit is not within the scope of Section 9 (a) of the Trading with the Enemy Act

A. Section 9 (a) permits suits only for return of particular property held by the Alien Property Custodian or interests in such property or its proceeds.—Section 9 (a) of the Trading with the Enemy Act provides, in so far as here relevant:

Any person * * * claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him * * * may file with the said custodian a notice of his claim * * *. If * * * the claimant shall have filed the notice as above required * * * said claimant may institute a suit in equity * * * in the district court of the United States for the district in which such claimant resides * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled.

It will be seen immediately that a suit must have several characteristics before it may be brought under this section. The plaintiff must be a person not an enemy or ally of enemy. He must claim an interest in property which is held by the Custodian. The object of the suit must be to establish that interest in the property held by the Custodian and to obtain a return of it.

It is conceded that the appellants here are not enemies or allies of enemy. But this suit is not within the terms of Section 9 (a) unless the appellants seek to establish and obtain the return of an interest in property *held by the Custodian*. An interest in other property will not suffice. If they do not claim an interest in property which the Custodian has, or its proceeds, their suit is not within the terms of Section 9 (a).

This conclusion is clear not only from the terms of Section 9 (a) but also from the function of that section in the statutory scheme of the Trading with the Enemy Act. One of the purposes of the Act was to permit the Government to obtain possession of all enemy property speedily. Rather than providing for a judicial determination of enemy ownership prior to seizure, therefore, the Act permitted the Custodian to demand possession of any property which he determined to be enemy owned. 50 U. S. C. App. Section 7 (c). The demand had to be honored; a claim of nonenemy ownership would not be accepted as a ground for withholding delivery of the property upon the Custodian's demand. *Central Union Trust Co. v. Garvan*, 254 U. S. 554 (1921); *Commercial Trust*

Co. v. Miller, 262 U. S. 51 (1923). At the beginning of this war the scope of the Custodian's peremptory power was enlarged so to give him authority to vest the property of any foreign national without a determination of enemy status. See *Silesian-American Corp. v. Clark*, 68 Sup. Ct. 179 (Dec. 8, 1947).

This grant of authority to the Custodian to seize property peremptorily required a counterbalancing procedure by which the issue of enemy ownership of the seized property could be determined. This was provided for by Section 9 (a). After property was seized by the Custodian any person not an enemy or ally of enemy was permitted to sue the Custodian to get it back. If he did not claim the entire ownership of the vested property, he could sue to establish and get back the interest to which he was entitled. 50 U. S. C. App. Section 9 (a). In short, the function of Section 9 (a) was to provide a method by which the Custodian could be sued to establish whether the property which he had vested was enemy owned or not.²

² This method of providing a judicial determination of enemy ownership was examined and found valid in *Stoehr v. Wallace*, 255 U. S. 239 (1921). The court's opinion, at p. 245, makes clear the function of a 9 (a) suit:

"There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit,

Nothing in Section 9 (a) can support a suit to establish an interest in property or rights which the Custodian does not have. As stated by the Court of Appeals for the District of Columbia in *Sigg-Fehr v. White*, 285 Fed. 949, 954 (1923) :

The right of recovery is restricted to the property seized or the proceeds derived from the sale of such property by the Custodian. This measures the jurisdiction conferred by Congress. In other words, the government has permitted itself to be sued only to the extent limited by the act. To extend this proceeding to embrace additional causes of action would amount to subjecting the sovereign to a suit * * * over which the court has not been accorded jurisdiction.

B. *The only property held by the Custodian here consists of the right, title and interest of Ilse Schloesser.*—The only property which the vesting order in this case purported to take consisted of the right, title and interest of Ilse Schloesser in the trust created by the decedent's will. The Custodian might have vested the trust *res* itself, leaving to those nonenemies claiming an interest in that property the remedy of a suit for return under Section 9 (a) of the Act. *Stoehr*

which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious."

v. *Wallace*, 255 U. S. 239, 245 (1921). But he did not. He vested only the right, title and interest of Ilse Schloesser.

He did not vest the rights of anyone else. The vesting order contained the phrase "and her heirs and distributees" but these words would have had significance only if Ilse Schloesser had been dead at the time the order was issued. No one can be the heir of a living person. Since Mrs. Schloesser was alive at the time of the vesting order there were no persons who could then have been described as her "heirs and distributees."

Assuming, as the appellants have alleged, that Kurt H. Koehler had a contingent remainder interest in the trust rather than a mere expectancy, the Custodian did not vest that interest. Kurt H. Koehler was not an heir or even an heir presumptive of Ilse Schloesser at the time of the vesting order. His interests would have been vested only if the Custodian had attempted to take the interests in the trust of every person who might, on any conceivable sequence of events, turn out to be an heir or distributee of Ilse Schloesser at the indeterminate future time when she dies. This the Custodian certainly did not do. He used the words "heirs and distributees" in their familiar sense to avoid the possibility that his order would be construed as taking nothing in the event that Ilse Schloesser were dead at the time of the vesting. Cf. *Miller v. Schutte*, 287 Fed. 604 (App. D. C., 1923). The vesting order took her interest if she were alive at the time of the order or it took those of her heirs and distributees if she were dead.

Nor did the Custodian define the extent of the rights which he vested. He simply took whatever rights Ilse Schloesser had. Mrs. Koehler's will gave her the right to demand possession of the corpus of the trust in a certain way (R. 17), and the Custodian wanted to make it clear that this right was included in the undefined bundle which he vested. His order therefore vested

All right, title, interest and claim of any kind of character whatsoever of Ilse Schloesser * * * including the right to demand * * * payment and delivery * * * of a certain trust fund, for which provision is made in * * * clause "Third" of said will and said codicil thereto (R. 45).

Under what circumstances this right might be exercised is, of course, to be determined by the terms of the will.

The Custodian, in sum, vested the undefined quantum of rights which belonged to Ilse Schloesser. Cf. *Stern v. Newton*, 180 Misc. 241, 246, 39 N. Y. S. 2d 593, 598 (N. Y. Sup. Ct., 1943). If the trustees had any rights in the trust corpus they still have them. If Kurt H. Koehler was a contingent beneficiary of the trust he still retains his contingent interest. The vesting simply substituted the Alien Property Custodian for Ilse Schloesser, leaving all the remaining interests in the trust in *status quo*.

C. *This suit is not a suit for return of an interest in the property vested by the Custodian.*—The application of the jurisdictional limitations of Section 9 (a) to this case is clear. The Custodian is possessed of

no more than the interest which Mrs. Schloesser was given by Mrs. Koehler's will. He does not have possession of the trust property. A suit under Section 9 (a), therefore, can be maintained only by persons claiming some share of Mrs. Schloesser's interest. If the Custodian was wrong in determining that Mrs. Schloesser was an enemy, she could sue under 9 (a) to get her interest back. But a person not claiming a share of Mrs. Schloesser's interest has no standing under Section 9 (a) since he is not claiming an interest in any property held by the Custodian. It is clear here that the plaintiffs make no claim for Mrs. Schloesser's interest. They seek, rather, to establish the interests of Kurt Koehler and William L. Brewster in the trust corpus.

They thus seek to establish their rights—and limit the Custodian's—in property not held by the Custodian. This they may not do under Section 9 (a).

* * * it is evident that consent of the United States to be sued in the circumstances we are considering is wholly lacking, for this is not a suit brought by a non-enemy owner to recover possession of property seized in the belief that it was enemy-owned, and in that case alone has Congress consented that the United States may be sued as to such seized property. [*Cummings v. Hardee*, 102 F. 2d 622, 627 (App. D. C., 1939) cert. den. 307 U. S. 637.]

The situation may be analogized to that which would arise if the Custodian were to vest a tract of land. If the Custodian vests "Tract A" those claiming interests in Tract A may, under Section 9 (a), bring

suit to establish those interests. But the owners of adjoining "Tract B" cannot sue under Section 9 (a) to establish the boundaries between A and B. It may be true that there is a dispute over the boundary. It may even be true that authority is given elsewhere for a suit against the United States to establish such disputed boundaries. But such a suit would not be within the scope of Section 9 (a). The dispute as to the boundary between A and B is independent of the Custodian's vesting and the suit to settle it would not determine whether Tract A belonged to an enemy or nonenemy and therefore should be retained or returned. Similarly, there may be in this case a dispute as to where the interest of Ilse Schloesser, to which the United States has succeeded, ends and where the interests of the plaintiffs begin, but that dispute is not cognizable under Section 9 (a) of the Trading with the Enemy Act.

This result can hardly give rise to any complaint by the appellants. The Alien Property Custodian has so far taken nothing from them. They still hold a major portion of the trust property. The remainder is being held by the defendant banks pursuant to freezing regulations which the appellants have not sought to satisfy by applying for a license.³

³ It should be noted that the property held by the defendant banks was "frozen" pursuant to Treasury regulations which applied prior to the Custodian's vesting order (see Executive Order 8389, as amended, 5 Fed. Reg. 1400). The appellants themselves petitioned the County Court of Multnomah County for permission to deposit the trust funds in a blocked account for Ilse Schloesser and that court granted their request and ordered them to do so (R. 23). All this took place before the Custodian vested any in-

Certainly the appellants cannot expect to obtain an adjudication of their right to keep the property they have and to obtain the remainder from the defendant banks by suing the Custodian for property which he has never had. If they wish a speedy adjudication of the extent of the rights of Ilse Schloesser to which the Custodian has succeeded they may pay over the property which they have to the Custodian and sue for its return. This is an adequate remedy. *Stoehr v. Wallace*, 255 U. S. 239 (1921). Or, if they do not wish to surrender the *res* to the Custodian, they may wait until the Custodian seeks to assert his rights and then defend against him. But they cannot keep the trust property which they have and at the same time sue the Custodian to establish their interests in it.

* * * neither the lower court nor any other tribunal in or of the United States had jurisdiction to compel the Custodian to come into court and either litigate or forego his demand * * *. The statute creating the Custodian enables him to capture enemy property with a sergeant and file, or otherwise *vi et armis*. He may also file a libel of possession, or he may sue in other ways; but he cannot be sued except in respect of that which he has already obtained. He can use his own method of procedure; courts cannot coerce him *in limine*. [Hough, J., concurring in *Ameri-*

terest whatsoever. And, in any event, the appellants have not sued here for relief from the freezing controls, but for an adjudication of rights under Section 9 (a) of the Trading with the Enemy Act.

can Exchange Nat. Bank v. Garvan, 273 Fed. 43, 48 (C. C. A. 2d, 1921), *affd. sub. nom. Simon v. American Exchange National Bank*, 260 U. S. 706 (1922).]

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted.

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property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

* * * * *

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

* * * * *

SEC. 17. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court, as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

KURT H. KOEHLER and WILLIAM L. BREWSTER, as ex-
ecutors of the last will and testament and codicil thereto of
Bertha Koehler, deceased, and as trustees under the last will
and testament and codicil thereto of Bertha Koehler, deceased,
and KURT H. KOEHLER in his individual capacity,
Appellants,

v.

TOM C. CLARK, Attorney General of the United States, as
successor in office of James E. Markham, Alien Property
Custodian, THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a national banking association, and THE
UNITED STATES NATIONAL BANK OF PORTLAND
(OREGON), a national banking association,
Appellees.

REPLY BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for
the District of Oregon.

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In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,
Appellants,

v.

TOM C. CLARK, Attorney General of the United States, as successor in office of James E. Markham, Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,
Appellees.

REPLY BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

I.

INTRODUCTORY STATEMENT

The Custodian* asserted in the lower court that the two defendant banks had been improperly joined with the Custodian as defendants (R. p. 64). This was the sole ground upon which the District Court relied in dismissing the suit for want of jurisdiction (R. p. 78). Despite these facts the brief of appellee makes no attempt

*The term "Custodian" as used herein refers to the Alien Property Custodian and his successor, the Attorney General.

to sustain the action of the lower court in relying on the ground of improper joinder. We assume, therefore, that the Custodian now concedes that the lower court erred in relying on that ground and in holding that the joinder of the defendant banks was sufficient to deprive the court of jurisdiction to entertain a suit under Section 9(a) of the Trading with the Enemy Act. See *American Insurance Co. v. Scheufler*, 129 F. (2d) 143, 145 (C.C.A. 8, 1942).

The brief of appellee argues, in effect, that although the lower court erred in its reliance upon the joinder of the banks as defendants for its conclusion that the court was without jurisdiction, the result arrived at by the court was correct because upon other grounds it should be determined that the court was without jurisdiction.

In appellant's brief we discussed only the ground upon which the lower court relied, that is, the question of joinder. In this reply we will discuss the grounds on which appellee now relies in his assertion that the lower court had no jurisdiction.

As a matter of fact, we could not have anticipated the argument appellee now makes. We will develop in later pages that the grounds on which appellee now relies are different from any asserted by appellee in the lower court.

As a preface to the argument on the specific grounds now relied on by appellee, we concede the correctness of appellee's position, stated beginning at page 6 of his brief, that this suit against the Custodian is one against

the United States and that the lower court has no jurisdiction to entertain the suit unless authority for the suit can be found in Section 9(a) of the Trading with the Enemy Act. We will contend, however, that the suit is one authorized by Section 9(a) of the Act and, accordingly, that the lower court erred in dismissing for want of jurisdiction.

In the lower court appellee contended that the suit should be dismissed because

“ . . . It appears from the face of the complaint that the property which is the subject of the action has not been delivered or paid to defendant . . . Alien Property Custodian and that neither the Trading with the Enemy Act nor any other statute of the United States authorizes a suit against the . . . Alien Property Custodian for a declaration of the right and title of any persons . . . or for a declaration of the efficacy or validity of a vesting order issued by the Alien Property Custodian *until after the possession of the vested property is transferred, delivered or paid to the Alien Property Custodian.*” (Italics ours) (R. p. 61).

Thus the contention was made that the Vesting Order was broad enough to reach the corpus of the trust which, as the Vesting Order states, was then “in the process of administration by William L. Brewster and Kurt H. Koehler, as executors and trustees” (R. p. 46). Read with the Vesting Order the contention quoted above from page 61 of the Record was that no suit would lie under Section 9(a) until the corpus of the trust was physically in the possession of the Custodian.

That position is, we believe, disposed of by the

authorities which permit suits under Section 9(a) following a vesting order without physical transfer to the Custodian of the property described in the vesting order. The very making of a vesting order brings the property within the description in Section 9(a) of property "conveyed, transferred, delivered or paid to the . . . Custodian." *The Pietro Campanella*, 47 F. Supp. 374 (D.C. Md. 1942); *The Antoinetta*, 49 F. Supp. 148 (D.C. Pa. 1943), affirmed 153 F. (2d) 138, 143, certiorari denied 328 U.S. 863, 66 S. Ct. 1368, petition for rehearing denied 67 S. Ct. 31; *The Aussa*, 52 F. Supp. 927 (D.C. N.J. 1943), reversed on other grounds 153 F. (2d) 138, certiorari denied 328 U.S. 864, 66 S. Ct. 1370, petition for rehearing denied 67 S. Ct. 33; *The Brennero*, 53 F. Supp. 441 (D.C. N.J. 1944), reversed on other grounds 153 F. (2d) 138, certiorari denied 328 U.S. 864, 66 S. Ct. 1369, petition for rehearing denied 67 S. Ct. 32.

Appellee now has apparently abandoned this position taken in the court below that the trust res itself has been vested and that the physical transfer of the corpus of this trust is essential to sustain the jurisdiction of the court in this case. Appellee now changes to a different position. He now asserts that the only property vested was the "interest of Ilse Schloesser" in the trust (Appellee's Br. p. 11). He proceeds:

"The Custodian might have vested the trust res itself, leaving to those non-enemies claiming an interest in that property the remedy of a suit for return under Section 9(a) of the Act. . . . But he did not. He vested only the right, title and interest of Ilse Schloesser." (Appellee's Br. pp. 11-12).

“ . . . If the trustees had any rights in the trust corpus they still have them. If Kurt H. Koehler was a contingent beneficiary of the trust he still retains his contingent interest. The vesting simply substituted the Alien Property Custodian for Ilse Schloesser, leaving all the remaining interests in the trust in status quo.” (Appellee’s Br. p. 13).

But although he now contends that the trust res has not been directly vested, the Custodian has not abandoned his position that by virtue of the Vesting Order he is entitled to possess and control the trust assets. This claim of the Custodian goes to the merits of this suit. The appellants assert that they have the right to possess and administer the trust assets and this suit was instituted to establish that right.

II.

THE EFFECT OF THE VESTING ORDER

A. The Interest of Kurt H. Koehler.

To understand fully the position of the Custodian it is essential to examine the pertinent portions of the Vesting Order, which for convenient reference we quote:

“That the property described as follows:

All right, title, interest and claim of any kind or character whatsoever of Ilse Schloesser, and her heirs and distributees, in and to the estate of Bertha Koehler, deceased, and under clause ‘Third’ of the will of said Bertha Koehler, and paragraph (g) thereof per codicil dated July 11, 1933, including the right to demand from the executors of said estate and from the trustees

under said will, payment and delivery of the principal and income of a certain trust fund, for which provision is made in said clause 'Third' of said will and said codicil thereto,

is property payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely, Ilse Schloesser, and her heirs and distributees, . . .

"That such property is in the process of administration by William L. Brewster and Kurt H. Koehler, as Executors and Trustees, acting under the judicial supervision of the Circuit Court of the State of Oregon for the County of Multnomah;

.

"Hereby Vests in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States." (R. pp. 45-46)

It must be noted that the Order (1) vests not only the interest of Ilse Schloesser but also the interests of her heirs and distributees; (2) determines that Ilse Schloesser and her heirs and distributees are enemy nationals and that the property vested is payable or deliverable to or claimed by said enemy nationals; (3) recites that such property is in the process of administration by the appellants as trustees; and (4) provides that the vested property is to be administered, liquidated, sold or otherwise dealt with by the Custodian for the benefit of the United States.

The Custodian has consistently taken the position that by virtue of the Vesting Order Kurt H. Koehler,

as a possible heir and distributee of Ilse Schloesser, is an enemy national and as such his interest in the trust, however contingent, has been vested. As an enemy national it has been urged that he is precluded from bringing suit except by a proper case filed under Section 9(a). This argument in effect was made by the Custodian in presenting his motion for judgment on the pleadings. This point was also the basis of the Custodian's third affirmative defense (R. p. 64). The Custodian now concedes that the appellants are not enemies or allies of enemies (Appellee's Br. p. 9), but he asserts that the interest of Kurt H. Koehler as a possible heir of Ilse Schloesser has not been vested (Appellee's Br. pp. 12-13). We will concur in that assertion, but this does not relieve the appellant trustees from the duty of protecting the interest of Kurt H. Koehler as a possible beneficiary of the trust and of conserving the principal and income of the trust and administering its assets. *Isenberg v. Trent Trust Co.* (C.C.A. 9, 1928), 26 F. (2d) 609, former opinion adhered to 31 F. (2d) 553, certiorari denied 49 S. Ct. 479, 279 U.S. 862.

B. The Right to Possess, Control and Administer the Trust Res.

As we have stated, the principal argument now urged by the appellee is that the property vested by the Custodian is not the trust res but the intangible interest of Ilse Schloesser, and as this is not a suit to recover that interest the court is without jurisdiction. We agree that

the Custodian has not directly vested the corpus of the trust, but this argument of the appellee ignores the effect of the Vesting Order as written and applied by the Custodian. The Custodian vested the alleged right of Ilse Schloesser to demand from the trustees payment and delivery of the corpus of the trust. That the Custodian deems the Order to have vested the right to possess and control the trust property is apparent from the recital in the Vesting Order that the vested property "is in the process of administration by William L. Brewster and Kurt H. Koehler, as Executors and Trustees." It is difficult to imagine trustees administering the intangible rights of a beneficiary—they administer the trust assets.

The Custodian has consistently demanded possession and control of the corpus of the trust (R. p. 77). His motion to dismiss (R. p. 61) was based upon the ground that the trust assets have not been transferred, delivered, or paid to him. If by virtue of the Vesting Order the Custodian has the right, as he claims, to possession of the trust res, he has vested a property interest which the trustees insist is theirs and which by this suit they seek to establish.

As the interest of Ilse Schloesser is measured or defined by the Custodian, this is a suit to establish the appellants' claim to a portion of that interest for it is a suit to determine the right of the trustees to hold and administer the trust property. The illustration employed by the Custodian on pages 14 and 15 of his brief does

not present an accurate picture. In this case, although the Custodian has vested an intangible interest in "Tract A" (the right of Ilse Schloesser), by his own interpretation and application of the Vesting Order he has also seized the right to possess and dispose of and receive the rents and profits from "Tract A" (the trust res). As the legal owner of "Tract A", the appellants have instituted this suit to establish their ownership of the property and their right to the continued possession thereof and to receive the rents and profits therefrom. Certainly this is a suit, within the language of Section 9(a), "to establish the interest, right, title" of appellants to a portion of the property seized by the Custodian.

III.

THIS SUIT UNDER SECTION 9(a) OF THE ACT AFFORDS THE ONLY EFFECTIVE REMEDY AVAILABLE TO APPELLANTS

At page 16 of his brief the Custodian suggests that appellants have two alternative remedies to establish their right to hold and administer the trust property, viz:

"If they wish a speedy adjudication of the extent of the rights of Ilse Schloesser to which the Custodian has succeeded they may pay over the property which they have to the Custodian and sue for its return. This is an adequate remedy. *Stoehr v. Wallace*, 255 U.S. 239 (1921). Or, if they do not wish to surrender the res to the Custodian, they

may wait until the Custodian seeks to assert his rights and then defend against him. But they cannot keep the trust property which they have and at the same time sue the Custodian to establish their interests in it."

With the exception of certain real estate, household furniture and jewelry (R. pp. 24, 63-64), the assets of the trust are held by the two defendant banks. Both banks have refused to deliver those assets to the appellant trustees, basing their refusal upon the belief that they are prevented from so doing by the terms of the Act (Appellants' Br. pp. 5, 6, 13, 14). These assets cannot be obtained by the appellants in the absence of a judicial determination, in a suit under Section 9(a), of the effect of the Vesting Order. The real estate is not in the control of the appellants in the sense that any act of appellants is necessary to transfer possession to the Custodian. If, as he maintains, the Custodian has vested the right to possess, hold and dispose of the real estate of the trust, that right has been transferred to him by the Vesting Order as completely as if by conveyance. *Commercial Trust Co. v. Miller*, 43 S. Ct. 486, 262 U.S. 51. Furthermore, appellants may very well breach their fiduciary obligation as trustees if by their conduct they cause a voluntary delivery to the Custodian of trust assets which they insist the Custodian has no right to possess and which he has not directly vested. *Isenberg v. Trent Trust Co.*, supra. It is not an answer to this suit, then, to say that the right of the Custodian to demand the trust res can be determined only after the appellants voluntarily transfer or cause a transfer

of the trust assets to the Custodian.

The proper method for the Custodian to assert his alleged right to possession of the trust property is by a suit under Section 17 of the Act. Such a suit is possessory in nature and defenses based upon the merits of the defendants' claim to the property cannot be urged. The sole remedy of the claimants is by a suit in equity under Section 9(a). 50 U.S.C.A., Appendix, Section 7(c); *Commercial Trust Co. v. Miller*, supra; *Central Union Trust Company v. Garvan*, 41 S. Ct. 214, 254 U.S. 554. Accordingly, appellants are in no position to defend a suit by the Custodian to assert his rights. In this connection it must be noted that the Act was amended on August 6, 1946, by the addition of Section 33, which reads in part as follows:

"No suit pursuant to section 9(a) may be instituted after the expiration of two years from the date of seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought or from the date of enactment of this section, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9(a) or 32 hereof." (50 U.S.C.A., Appendix, Section 33).

This statute of limitations runs from the date of vesting or from the date of enactment, whichever is later. Thus, even though we were to assume that the appellants may defend, on the merits, a suit by the Custodian under Section 17 to enforce his demand for possession of the

trust property, the Custodian has not commenced such an action and cannot be compelled to do so (Appellee's Br. p. 16). Unless, therefore, the appellants act seasonably by prosecuting their own suit under Section 9(a) their claims will be outlawed. Certainly this is strong indication that Congress, by the enactment of Section 9(a) and Section 33, intended that claimants in the position of appellant trustees may bring a suit in equity under Section 9(a) to establish their interest in property demanded by the Custodian pursuant to a vesting order.

CONCLUSION

Appellants recognize that by the Vesting Order such rights as Ilse Schloesser had as a beneficiary of the trust became vested in the Custodian. We seek in this suit to have the court determine the extent of her rights and the consequent extent of the present rights of the Custodian. We seek to have the court "establish", to use the language of Section 9(a), that is, to define, the extent of the rights and obligations of the appellants as trustees and of Kurt H. Koehler as a contingent beneficiary of the trust.

There is no real reason why the suit should not be heard on its merits. Section 9(a) is to be broadly construed to give effect to its remedial purpose. *Becker Steel Co. of America v. Cummings*, 296 U.S. 74, 56 S. Ct. 15.

The relief prayed for by appellants may be granted

and this case disposed of quickly if appellee will concede that he has no right under the Vesting Order to demand, possess and control the trust assets. If he will not make this concession and the corollary concession that appellants, as trustees, are entitled to the possession and control of all assets of the trust, and to administer them as trustees, this suit should be heard on the merits.

This suit is within the language and spirit of Section 9(a) and for this reason as well as the reasons urged in our opening brief the appellants respectfully submit that the District Court erred in dismissing this case for want of jurisdiction.

WILLIAM BREWSTER,
HART, SPENCER, McCULLOCH & ROCKWOOD,
FLETCHER ROCKWOOD,
RICHARD DEVERS,
Attorneys for Appellants.

No. 11747

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership
doing business as FULLERTON MANUFACTUR-
ING COMPANY,

Appellants,

vs.

WORLD FIRE AND MARINE INSURANCE COM-
PANY OF HARTFORD, CONNECTICUT, a cor-
poration,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV 11 1947

PAUL P. O'BRIEN,

CLERK

No. 11747

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership
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Upon Appeal from the District Court of the United States
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Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

BENJAMIN J. GOODMAN

810 Wm. Fox Building

608 South Hill Street

Los Angeles 14, Calif.

For Appellee:

HINDMAN & DAVIS

607 South Hill Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 5814-BH

L. WALLACE and E. B. LANDRY, a copartnership,
doing business as FULLERTON MANUFACTUR-
ING CO.,

Plaintiffs,

vs.

WORLD FIRE AND MARINE INSURANCE COM-
PANY OF HARTFORD, CONNECTICUT, a cor-
poration,

Defendant.

COMPLAINT ON CONTRACT

Plaintiffs, for Claim for Relief, Allege:

I.

That at all times herein mentioned plaintiffs were part-
ners doing business under the fictitious name of Fuller-
ton Manufacturing Co. That the plaintiffs were and are
citizens of the State of California.

II.

That at all times mentioned herein the defendant was
and now is a corporation organized under and by virtue
of the laws of the State of Connecticut and was and now
is a citizen of the State of Connecticut. [2]

III.

That the defendant was at all times herein mentioned
writing insurance under and by virtue of the laws of
the State of California pertaining to insurance companies.

IV.

That the amount in controversy herein, exclusive of interest and costs, is \$13,798.50, and is in excess of \$3000.

V.

That the jurisdiction of this Court is based upon the diversity of citizenship of the parties hereto and the amount in controversy, exclusive of interest and costs, being in excess of \$3000.

VI.

That on or about the 31st day of December, 1945, for valuable consideration, the defendant issued a fire insurance policy on the California standard form, with a provisional reporting endorsement thereon, in which it insured the property of the plaintiffs in an amount not to exceed \$15,000.

VII.

That on or about the 14th day of February, 1946, and while said policy of insurance hereinabove mentioned was in full force and effect, a fire occurred on the premises of the plaintiffs resulting in a loss in the amount of \$27,253.18.

VIII.

That said policy of insurance provided as follows:

“ ‘Value Reporting Clause.’

(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each loca-

tion, all as of the last [3] day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.

“‘Full Reporting Clause.’ Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any) which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above described, less the amount of specific insurance, if any, actually in force at that location at the time of such report. Liability for loss hereunder occurring at any new location where, since filing the last report, the insured may have property as above described (except as provided in ‘Value Reporting Clause,’ paragraph 8) shall be apportioned in a like manner, except that the proportion used shall be the relation that the values at all locations reported prior to the loss, less the amount of re-

ported specific insurance, if any, bear to the actual cash value of the property above described at all locations, less the amount of specific insurance, if any, actually in [4] force at the time of such report. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss."

IX.

That at the time of the happening of said fire plaintiffs had not reported to the defendant the actual cash value of the property on hand on the last day of January, 1946, but, within the 30-day grace period allowed under the value reporting clause, plaintiffs advised the defendant company that the cash value of the merchandise on hand amounted to \$29,625.20, and that the loss to their property amounted to \$27,253.18.

X.

That under the terms and conditions of said policy of insurance the defendant became liable to plaintiffs in the proportion of \$27,253.18/29,625.20 of \$15,000, or \$13,798.50.

XI.

That said policy of insurance further provided as follows:

"Ascertainment of amount of loss. This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been

requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or [5] properties set forth in the preliminary proof or amendments thereto."

XII.

That on or about the 16th day of August, 1946 plaintiffs duly filed with the defendant a verified preliminary proof of loss in which the plaintiffs set forth that the cash value of the merchandise on hand amounted to \$29,625.20; that the loss and damage amounted to \$27,253.18; and the loss claimed under the policy provisions was \$13,798.50; to which said preliminary proof of loss the defendant company did not in writing disagree with the amount of the loss so claimed by the plaintiffs.

XIII.

That the plaintiffs have demanded of the defendant the sum of \$13,798.50 but the defendant has failed and refused to pay said sum of \$13,798.50.

XIV.

That there is due, owing, and payable to plaintiffs from defendant the sum of \$13,798.50, together with interest thereon at the rate of 7 per cent per annum from the 14th day of February, 1946.

Wherefore, plaintiffs pray judgment against the defendant in the amount of \$13,798.50, together with interest thereon at the rate of 7 per cent per annum from the 14th day of February, 1946; for costs herein expended; and for such other and further relief as to the court may seem proper.

GEORGE PENNEY

Attorney for Plaintiffs [6]

[Verified.]

[Endorsed]: Filed Sep. 27, 1946. [7]

[Title of District Court and Cause]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon George Penney, plaintiff's attorney, whose address is 939 Rowan Building, Los Angeles 13, Calif., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

EDMUND L. SMITH

Clerk of Court

By Edward F. Drew

Deputy Clerk

Date: 9/27/46.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[Stamped]: Received Oct. 1, 1946. U. S. Marshal's Office, San Francisco, Calif. Civil 27218. [8]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 3rd day of October, 1946, I received the within summons and complaint and served the same on World Fire and Marine Insurance Company of Hartford, Connecticut, by serving Mr. J. Andrus as General Adjuster at San Francisco, California, on the 3rd day of October, 1946.

GEORGE VICE

United States Marshal

By Herbert R. Cole

Deputy United States Marshal

Marshal's Fees

Travel\$.30

Service 2.00

2.30

* * * * *

[Endorsed]: Filed Oct. 5, 1946. [9]

[Title of District Court and Cause]

ANSWER

Comes now defendant and for Answer to Plaintiffs' Complaint:

I.

As to the allegations contained in Paragraph VI of Plaintiffs' Complaint, defendant admits the allegations except that defendant denies it insured the property of plaintiffs in an amount not exceeding \$15,000.00 but in and to an amount not to exceed limits as provided therein.

II.

As to the allegations contained in Paragraph VIII of Plaintiffs' Complaint, defendant admits that said policy of insurance provided among other conditions as alleged in Paragraph VIII. [10]

III.

As to the allegations contained in Paragraph X of said Complaint, defendant denies said allegations and each and every allegation therein contained and denies that defendant became liable to plaintiffs in the sum of \$13,798.50 or in any sum at all.

IV.

As to the allegations contained in Paragraph XII of Plaintiffs' Complaint, defendant admits the same except that defendant denies that the loss claimed under the policy provisions was \$13,798.50 or any other sum at all.

V.

As to the allegations contained in Paragraph XIV of Plaintiffs' Complaint, defendant denies that there is now or was at the time of the commencement of the foregoing entitled action, or at any other time, or at all, due or owing or payable to plaintiffs from defendant the sum of \$13,798.50 with interest, as alleged, or any other sum at all.

Further Pleading and as a Further and First Defense to Plaintiffs' Complaint Pro Tanto, Defendant Alleges:

I.

That on the 31st day of December, 1945, defendant issued to plaintiffs, its policy of fire insurance by the terms of which it insured plaintiffs, from December 31st, 1945 to December 31st, 1946, against all direct loss or damage by fire, except as therein provided, to an amount not to exceed limits as provided therein.

II.

That said policy was in the form known as "California Standard Form Fire Insurance Policy" as provided for by the Insurance Code, State of California, and to which was attached and made a part thereof "Provisional Reporting Policy Form No. 1." a copy of which "Provisional Reporting Policy Form No. 1." is hereto attached marked "Exhibit A", and made a part of this Answer as though fully set [11] forth herein.

III.

That said policy contained, among other provisions, the conditions alleged in Paragraph VIII of Plaintiffs' Com-

plaint and particularly provided, among other conditions, as follows, to-wit:

“‘Value Reporting Clause.’

(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.

“‘Full Reporting Clause.’ Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any), which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above [12] described, less the

amount of specific insurance, if any, actually in force at that location at the time of such report. Liability for loss hereunder occurring at any new location where, since filing the last report, the insured may have property as above described (except as provided in 'Value Reporting Clause,' paragraph 8) shall be apportioned in a like manner, except that the proportion used shall be the relation that the values at all locations reported prior to the loss, less the amount of reported specific insurance, if any, bear to the actual cash value of the property above described at all locations, less the amount of specific insurance, if any, actually in force at the time of such report. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss."

IV.

That on the 14th day of February, 1946, the property at the location specifically described in said policy, to wit: "345 E. Santa Fe, Fullerton, California" was damaged by fire and plaintiffs and defendant agreed that the amount of loss of said property was in the sum of \$27,253.18, and that the actual cash value of said property at said location was at the time of said fire and on January 31st, 1946, in the sum of \$29,625.20.

V.

That the last value of said property reported to defendant company, prior to the loss, was in the sum of \$2,000.00, which said report was made in writing to defendant company on January 3rd, 1946, purported to

report the actual cash value of the property insured at the location of 345 East Santa Fe, Fullerton, California, as of the [13] 31st day of December, 1945. That contrary to said report of \$2,000.00 value at said location at said date, the actual cash value of the property insured at said location on the 31st day of December, 1945, was in the sum of \$28,140.72, and defendant, if liable to plaintiffs at all, became liable under the terms of said policy for no greater proportion of plaintiffs' loss of \$27,253.18, than the sum of \$2,000.00 bears to the sum of \$28,140.72.

Further Pleading and as a Second, Further, and Separate Defense to Plaintiffs' Complaint, Defendant Alleges:

I.

Repeats and by reference thereto, makes a part hereof and as though fully set forth herein, each and every allegation and reference in Paragraphs I and II of Defendant's Further and First Separate Defense, Pro Tanta.

II.

That said policy was in renewal of Policy Number 013121, issued by defendant to plaintiffs on the 31st day of December, 1944, and insuring plaintiffs against loss by fire as therein provided from December 31st, 1944 to December 31st, 1945, and was in the form and under the same terms and conditions as provided in said Policy Number 013121.

III.

That each and both of said policies contained the conditions set forth in Exhibit A, attached to and made a part of this Answer, and by reference made a part thereof and more particularly, the conditions alleged and set

forth in Paragraph III of Defendant's Further and First Separate Defense, Pro Tanto, which is herein referred to and made a part thereof and fully set forth herein.

IV.

That in each and both of said policies were contained the following provisions, provided for by the statutory policy of the State of California, to wit: [14]

“‘Matters Avoiding Policy.’ This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.”

V.

That plaintiffs concealed and misrepresented material facts and circumstances concerning the insurance and the subject thereof in that although it was agreed by each and both of said policies that it was a condition of said policies that the insured should report to the company, this defendant, on the last day of each month of the policy term, the exact location of all property covered thereunder the actual cash value of said property at each location and the amount of specific insurance in force at each location, all as to the last day of that month, the plaintiffs, knowingly and wilfully, concealed from defendant the true actual cash value of the property located at 345 East Santa Fe, Fullerton, California, and misrepre-

sented the actual cash value of such property at such location in the following manner, to-wit:

“That plaintiffs, on and as of the 31st day of January, 1945, reported to defendant that the actual cash value at said location to be \$5,000.00 when in truth and fact, said actual cash value at said location was in the sum of \$19,856.00; that plaintiffs, on and as of the 28th day of February, 1945, reported to defendant that the actual cash value at said location to be \$6,000.00 when in truth and fact, said actual cash value at said location was in the sum of \$21,535.00; that plaintiffs, on and as of the 31st day of March, 1945, reported to defendant that the actual cash value at said location to be \$7,000.00 [15] when in truth and fact, the actual cash value at said location was in the sum of \$23,214.00; that plaintiffs, on and as of the 30th day of April, 1945, reported to defendant that the actual cash value at said location to be \$8,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$24,820.00; that plaintiffs, on and as of the 31st day of May, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$25,331.00; that plaintiffs, on and as of the 30th day of June, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$25,842.00; that plaintiffs, on and as of the 31st day of July, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said location

was in the sum of \$26,353.00; that plaintiffs, on and as of the 31st day of August, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$26,864.00; that plaintiffs, on and as of the 30th day of September, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact the actual cash value at said location was in the sum of \$27,375.00; that plaintiffs, on and as of the 31st day of October, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$27,886.00; that plaintiffs, on and as [16] of the 30th day of November, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$28,338.33; that plaintiffs reported to defendant on the 3rd day of January, 1946, that the actual cash value of such property was, as of December 31st, 1945, the sum of \$2,000.00, when in truth and in fact, such actual cash value was, as of December 31st, 1945, in the sum of \$28,140.72."

Wherefore, defendant prays that plaintiffs take nothing by their complaint and that defendant go hence and have and recover its costs and disbursements herein.

HINDMAN & DAVIS

By E. Eugene Davis

Attorneys for Defendant

607 South Hill Street

Los Angeles 14, California [17]

(EXHIBIT A)

Standard Forms Bureau Form 446 (April 1942)

PROVISIONAL REPORTING POLICY FORM
NO. 1. (MONTHLY AVERAGE)

This Policy Insures
L. WALLACE and E. V. LANDRY
doing business as FULLERTON MFG. CO.

Loss, if any, to be adjusted with the Insured named herein and payable to Assured named herein.

1. On merchandise of every description (except as hereinafter 'excluded') consisting principally of oil well tools manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and (Provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage or repairs, but loss thereon shall be adjusted with and payable to the insured named in this policy; all while contained in any building, shed or structure, or on the premises, and in or on cars and vehicles while within 300 feet of said premises, and also while in, on or under sidewalks, platforms, alleyways and open space, provided such property be located within 25 feet thereof, within the limits of the State of California.

2. "Provisional Amount Clause." The amount of insurance provided for hereunder is provisional and is the

amount on which the deposit premium is based, it being the intent of this insurance to insure hereunder the actual cash value of the property described herein subject to the limits of liability and provisions for other insurance hereinafter provided.

3. "Limit of Liability." This Policy Being for the Provisional Amount of \$....., Being% of the Total Contributing Insurance, Liability of This Company Is Limited to the Same Percentage of Any Loss and in No Event to Exceed the Same Percentage of Each of the Following Limits, but No Insurance Attaches Under Any One or More of the Following Limits Unless a Definite Amount Is Specified as a Limit and Inserted in the Blank Immediately Opposite the Location Item:

Item Number	Limit of Liability for all Contributing Insurance	Location Street Number and City
1.	\$15,000.00 at	345 E. Santa Fe, Fullerton, California
2.	\$..... at
3.	\$..... at
4.	\$..... at
5.	\$..... at
6.	\$..... at
7.	\$..... at
8.	\$..... at
9.	\$..... at
10.	\$ 3,000.00 at	any other location within the above named geographical limits where the in- sured may have property as above de- scribed, subject to the conditions of the "Exclusion Clause", Paragraph No. 4, and of the "Value Reporting Clause", Paragraph No. 8.

4. "Exclusion Clause." This Policy Does Not Cover

(A) Motor Vehicles, Property in Transit, Property at or in Fairs or Expositions, or Growing Crops;

(B) At Any Location, Which Was Not Included in the Last Statement of Values Received by This Company Prior to Loss, Provided the Insured Had Property as Herein Described at Risk at Such Location as of the Date for Which Such Statement Was Made as Provided in the "Value Reporting Clause", Paragraph 8.

5. "Contributing Insurance Clause." Permission Is Granted for Other Insurance Written Upon the Same Plan, Terms, Conditions, and Provisions as Those Contained in the Form Attached to This Policy, i. e., Insurance Written Under This Provisional Reporting Form. The Insurance Under This Policy in Accordance With Its Printed Conditions or Riders, Shall Contribute Only With Other Insurance as Herein Above Defined, Against Any Peril Insured by This Policy.

6. "Specific Insurance." Insurance Other Than Described in the "Contributing Insurance Clause", Paragraph 5, Shall Be Known as Specific Insurance for Which Permission Is Hereby Granted. However, in the Computation of the Final Premium It Shall Not Be Permissible to Deduct or Credit Such Specific Insurance Against the Values Shown in the Monthly Reports, Except When

(A) It Has Been Necessary to Procure Such Insurance to Protect Values in Excess of the Limits of Liability of This Policy, or

(B) It Has Been Disclosed by Written Endorsement Hereon Showing Location, Expiration and Amount.

7. "Excess Clause." This Policy Does Not Attach to or Become Insurance Against Any Peril Upon Property Herein Described Which at the Time of Any Loss Is Insured by "Specific Insurance" as Defined in Paragraph 6, Until the Liability of Such "Specific Insurance" Has Been Exhausted, and Then Shall Cover Only Such Loss or Damage as May Exceed the Amount Due From Such "Specific Insurance" (Including the Amount Otherwise Due From Invalid Insurance Had Same Been Valid, and Including Also the Amount Due From Any Uncollectible Insurance) After Application of Any Contribution, Co-insurance, Average, Distribution, or Other Similar Clauses Contained in Policies of Such "Specific Insurance" Affecting the Amount Due Thereunder, Not, However, Exceeding Limits as Set Forth Herein. Extended Coverage Endorsement 201 PR ATTD

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 4 801476 of the World Fire and Marine Insurance Co. Agency at Los Angeles, California. Dated December 31, 1945.

Name of Company

/s/ S. WEISBART

Trade Mark

Agent

[Crest]

Reg. U. S. Pat. Off.

446

April 1942

For Other Provisions See Reverse Side of This Rider [18]

Provisions Referred to in and Made Part of This Rider
(No. 446)

8. "Value Reporting Clause."

(A) It Is a Condition of This Policy That the Insured Shall Report to This Company on the Last Day of Each Month of the Policy Term the Exact Location of All Property Covered Hereunder, the Actual Cash Value of Such Property at Each Location and the Amount of Specific Insurance in Force at Each Location, All as of the Last Day of That Month. However, A Grace Period of Thirty (30) Days Shall Be Allowed for Compilation and Submission of Such Reports to This Company.

(B) If at the Time of Any Loss, the Insured Has Failed to File With This Company, Reports of Values as Above Required, This Policy, Subject Otherwise to All Its Terms and Conditions, Shall Cover Only at the Locations and for Not More Than the Amounts Included in the Last Report of Values Filed Prior to the Loss; and Further, if Such Delinquent Report Is the First Report of Values as Required to Be Filed, This Policy Shall Cover Only at the Locations Specifically Named Herein.

9. "Full Reporting Clause." Liability Under This Policy Shall Not in Any Case Exceed That Proportion of

Any Loss Hereunder (Meaning the Loss at the Location Involved After Deducting the Liability of Specific Insurance, if Any) Which the Last Value Reported to This Company prior to the Loss, Less the Amount of Reported Specific Insurance, if Any, at the Location Where the Loss Occurs, Bears to the Actual Cash Value of the Property Above Described, Less the Amount of Specific Insurance, if Any, Actually in Force at That Location at the Time of Such Report. Liability for Loss Hereunder Occurring at Any New Location Where, Since Filing the Last Report, the Insured May Have Property as Above Described (Except as Provided in "Value Reporting Clause", Paragraph 8) Shall Be Apportioned in a Like Manner, Except That the Proportion Used Shall Be the Relation That the Values at All Locations Reported Prior to the Loss, Less the Amount of Reported Specific Insurance, if Any, Bear to the Actual Cash Value of the Property Above Described at All Locations, Less the Amount of Specific Insurance, if Any, Actually in Force at the Time of Such Report. However, This Company Shall Not Be Liable Hereunder for a Greater Proportion of Such Loss at Any Location Than the Limit of Liability Herein Specified for That Location Bears to the Actual Cash Value of the Property Described at That Location at the Time of Loss.

10. "Premium Adjustment Clause." The premium named in the policy is provisional only. The actual premium consideration for the liability assumed hereunder shall be determined, at the expiration of this policy, by application of the following formula:

After Deducting the Amount of Specific Insurance, if Any, (Not Exceeding, However, the Amount of Value

Reported) at Each Location, an Average of the Total Remaining Values Reported at Each Location (but Not in Excess of the Limit of Liability Established Herein) Shall Be Made, and if the Premium on Such Average Values at the Rate Applying at Each Location Herein Provided Exceeds the Provisional Premium, the Insured Shall Pay to the Insurer an Additional Premium for Such Excess; and, if Such Premium Is Less Than the Provisional Premium, the Insurer Shall Refund to the Insured Any Excess Paid. If This Policy Is Written for a Term of More Than One Year, an Adjustment of Both the Premium Earned and the Amount of Deposit Premium Shall Be Made Annually as Herein Provided.

11. "Retained Premium Clause." It Is a Further Condition of This Policy, Anything to the Contrary Notwithstanding, That the Final Adjusted Premium as Provided in the "Premium Adjustment Clause", Paragraph 10, Shall in No Event Be Less Than \$100.00 Under This Policy.

12. "Premium Payment in Case of Loss Clause." It Is a Condition of This Policy That, in Case of Loss Occurring Hereunder, the Premium Applicable to the Amount of Loss Payment Shall Be Earned for the Term of the Contract; Therefore, the Insured Shall Pay This Company an Additional Premium at Pro Rata of the Rate Applicable Thereto for the Unexpired Term of This Policy on the Amount of the Loss Paid, and Said Premium May Be Deducted From the Payment of Said Loss.

13. "Reinstatement of Loss Clause." It is a condition of this policy that, in case of loss occurring hereunder, the amount of such loss shall be automatically reinstated after

its occurrence and this insurance shall then cover for the amount provided for hereunder.

14. "Verification of Values." This Company or its duly appointed representative, shall be permitted at all reasonable times during the term of this policy, or within a year after its expiration, to inspect the property covered hereunder and to examine the insured's books, records and such policies as relate to any property covered hereunder. This inspection and/or examination shall not waive or in any manner affect any of the terms or conditions of this policy.

15. This policy attaches and expires at any location at noon, meaning thereby noon standard time at such location.

16. "Subrogation Waiver." It is understood and agreed that any release from liability in a written contract entered into, prior to loss hereunder, by the insured with any person, firm, corporation or municipality, shall in no way affect this policy or the rights of the insured to recover hereunder.

17. "No Control Clause." This policy shall not be affected by failure of the insured to comply with any of the warranties or conditions endorsed hereon, in any portion of the premises over which the insured has no control.

18. "Permits." Permission granted to make alterations or repairs to the above described building(s) without limit of time and to build additions, and if in contact therewith, this policy shall cover in same under its respective items; permission granted to cease operations or shut-down for not to exceed sixty (60) days at any one time, subject to the conditions of the watchman clause, if any,

made a part of this policy; permission also granted to work at any and all times, and for such use of the premises as is usual and incidental in the business, as conducted therein, and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

19. "Lightning Clause." (This Clause Void as to Cyclone, Tornado or Windstorm Insurance.) This Policy Shall Cover Any Direct Loss or Damage by Lightning (Meaning Thereby the Commonly Accepted Use of the Term "Lightning" and No Case to Include Loss or Damage by Cyclone, Tornado or Windstorm) Not Exceeding the Sum Insured nor the Interest of the Insured in the Property, and Subject in all Other Respects to the Terms and Conditions of This Policy. Provided, However, That the Liability of This Company for Any Direct Loss or Damage by Lightning Shall Not Exceed the Liability That Would Have Been Incurred Hereunder if Said Loss or Damage Was Caused by Fire, Whether or Not Other Insurance on the Property Be Against Direct Loss by Lightning.

20. "Electrical Exemption Clause." If Dynamos, Wiring, Lamps, Motors, Switches or Other Electrical Appliances or Devices Are Insured by This Policy, This Insurance Shall Not Cover Any Immediate Loss or Damage to Dynamos, Exciters, Lamps, Motors, Switches, or Any Other Apparatus for Generating, Utilizing, Testing, Regulating or Distributing Electricity, Caused Directly by Electric Currents Therein, Whether Artificial or Natural, Including Lightning.

[Endorsed]: Filed Nov. 25, 1946. [19]

[Title of District Court and Cause]

AGREED STATEMENT OF FACTS

The respective parties, through their attorneys, stipulate, subject to proper objection as to relevancy and materiality, to the following facts:

I.

That L. Wallace and E. B. Landry are now and were at all times a copartnership doing business under the name of Fullerton Manufacturing Co., with its place of business at 345 East Santa Fe Avenue, Fullerton, California.

II.

That the defendant World Fire and Marine Insurance Company was and now is a corporation organized under and by virtue of the laws of the State of Connecticut and authorized to write fire insurance in [20] the State of California.

III.

That on or about the 31st day of December, 1945, the defendant executed and delivered to plaintiffs its California Standard Form Fire Insurance Policy No. 4801476. The original of said policy is hereto attached, marked "Exhibit A," and offered in evidence by plaintiffs.

IV.

That on or about the 14th day of February, 1946, a fire occurred at the premises described in said policy as 345 East Santa Fe Street, Fullerton, California.

V.

That the actual cash value of the property described in said policy at said location on said 14th day of February, 1946, was in the sum of \$29,625.20, and the actual loss and damage to said property at said location by said fire was in the sum of \$27,253.18.

VI.

That the plaintiffs had reported to defendant, in writing, on January 3, 1946, that the actual cash value of the property described at said location on December 31, 1945, was in the sum of \$2000.00, whereas, in fact, the said property at said location at said time was of the value of \$28,140.72.

VII.

That plaintiffs made no further statements or declarations of value to defendant until on or about the 26th day of February, 1946, when plaintiffs orally reported to defendant that the actual cash value of said property at the time of the fire was \$29,625.20, and on the 29th day of March, 1946, in writing, reported the actual cash value of said property to have been, as of January 31, 1946, \$29,000.00, and as of February 13, 1946, \$29,000.00.

VIII.

That prior to December 31, 1945, defendant's policy [21] No. 013121 was in full force and effect. Said policy is offered as Defendant's "Exhibit 1."

IX.

That commencing on or about the 31st day of January, 1945, plaintiffs reported to defendant, in writing, what purported to be the actual cash value of the property de-

scribed in said policy as located at 345 East Santa Fe Street, Fullerton, California, as follows:

"That plaintiffs, on and as of the 31st day of January, 1945, reported to defendant that the actual cash value at said location to be \$5,000.00, when in truth and fact, said actual cash value at said location was in the sum of \$19,856.00; that plaintiffs, on and as of the 28th day of February, 1945, reported to defendant that the actual cash value at said location to be \$6,000.00 when in truth and fact, said actual cash value at said location was in the sum of \$21,535.00; that plaintiffs, on and as of the 31st day of March, 1945, reported to defendant that the actual cash value at said location to be \$7,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$23,214.00; that plaintiffs, on and as of the 30th day of April, 1945, reported to defendant that the actual cash value at said location to be \$8,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$24,820.00; that plaintiffs, on and as of the 31st day of May, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$25,331.00; that plaintiffs, on and as of the 30th day of June, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$25,842.00; that plaintiffs, on and as [22] of the 31st day of July, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said

location was in the sum of \$26,353.00; that plaintiffs, on and as of the 31st day of August, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$26,864.00; that plaintiffs, on and as of the 30th day of September, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact the actual cash value at said location was in the sum of \$27,375.00; that plaintiffs, on and as of the 31st day of October, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$27,886.00; that plaintiffs, on and as of the 30th day of November, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$28,338.33; that plaintiffs reported to defendant on the 3d day of January, 1946, that the actual cash value of such property was, as of December 31, 1945, the sum of \$2,000.00, when in truth and in fact, such actual cash value was, as of December 31, 1945, in the sum of \$28,140.72."

Dated: January 6, 1947.

GEORGE PENNEY

Attorney for Plaintiffs

W. W. HINDMAN

E. EUGENE DAVIS

By E. E. D.

Attorneys for Defendant

[Endorsed]: Filed Jan. 6, 1947. [23]

[Title of District Court and Cause]

OPINION

George Penney, Esq., 939 Rowan Building, Los Angeles
13, California, Attorney for Plaintiffs.

Hindman & Davis, Esqs., 607 South Hill Street, Los Angeles
14, California, Attorneys for Defendant.

This is an action for the recovery of a fire loss occurring under a "provisional reporting policy" issued by the defendant insurance company, covering a stock of merchandise of fluctuating value. The policy was for a term of one year commencing at noon on December 31, 1945. It succeeded an almost identical policy. The fire occurred February 14, 1946. [24]

This case was submitted to the Court on an agreed statement of facts. The dispute between the parties revolves around an interpretation of this type of policy.

The first policy was taken out in December, 1944, for the provisional amount of Twenty Thousand Dollars (\$20,000.00), and a premium of One Hundred Ninety-two Dollars (\$192.00) was paid. Before the effective date, the provisional amount was reduced to Fifteen Thousand Dollars (\$15,000.00), and Forty-eight Dollars (\$48.00) of the premium was returned. The limit of liability stated was Thirty Thousand Dollars (\$30,000.00). During 1945, plaintiffs reported an average value of only Four Thousand Dollars (\$4,000.00), although the true value averaged Twenty-five Thousand Four Hundred and Sixty-three Dollars (\$25,463.00). At the end of the year, the total premium due at ninety-six cents per One Hundred Dollars (\$100.00) insured was only Thirty-eight Dollars and Forty Cents (\$38.40), on the basis

of the values reported by plaintiffs, so all of the deposit premium in excess of One Hundred Dollars (\$100.00) was returned to them.

In December, 1945, the new policy was executed at the same rate. The provisional amount was Four Thousand Four Hundred Dollars (\$4,400.00). The limit of liability was set at Fifteen Thousand Dollars (\$15,000.00). The policy was in all other respects identical in terms with the first policy, except that the provisional premium paid was only One Hundred Dollars (\$100.00), instead of One Hundred and Forty-four Dollars (\$144.00). The policy covered the insured property from noon, December 31, 1945, until noon, December 31, 1946.

On January 3, 1946, the plaintiffs reported that the property insured was worth Two Thousand Dollars (\$2,000.00) as of December 31, 1945. The actual value at that time was Twenty-eight Thousand One Hundred and Forty Dollars (\$28,140.00). On February 14, 1946, a fire occurred on the insured premises causing a loss of Twenty-seven Thousand Two Hundred and Fifty-three Dollars (\$27,253.00). On February 26, 1946, plaintiffs [25] reported that the true value at the time of the fire was Twenty-nine Thousand Six Hundred and Twenty-five Dollars (\$29,625.00). On March 29, 1946, they reported that the property was worth Twenty-nine Thousand Dollars (\$29,000.00) on January 31, 1946, and Twenty-nine Thousand Dollars (\$29,000.00) on February 13, 1946, the day before the fire. On August 16, 1946, they filed a proof of loss with the defendant, claiming Thirteen Thousand Seven Hundred and Ninety-eight Dollars and Fifty Cents (\$13,798.50), as their recovery under the policy. Defendant admitted the amount of the

loss but denied that any recovery was due. Plaintiffs sued for the above amount, plus 7% interest from the date of the fire.

The premium due under this policy is subject to variation with variations in the coverage. A deposit premium paid at the beginning is to be adjusted thereafter according to the value of the property at risk from month to month. At the end of the term, the monthly values are averaged and the premium calculated. If the premium based on the averaged values at the termination of the policy exceeds the deposit premium, the insured pays the excess, if less, the insurer refunds the difference in excess of the minimum premium of One Hundred Dollars (\$100.00).

To determine the value of the property at risk, the insured must make a monthly report of values, according to the terms of the "value reporting clause" (Paragraph 8):

"(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in

the last report of values filed prior to the loss; [26] and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.”

The policy contains a “full reporting clause” or “honesty clause”, (paragraph 9) so drawn that if the insured declares his property at a figure below its actual value, his recovery is limited to such proportion of the loss as the value declared bears to the actual value of the property. Where he diminishes his premium, he diminishes his potential recovery. This paragraph also prevents an unjust recovery based on an over-evaluation of the property, by means of a formula not material to the issues in this case.

The plaintiffs contend their recovery should be based upon the reported value of Twenty-nine Thousand Six Hundred and Twenty-five Dollars (\$29,625.00), which they contend was reported within the thirty day grace period. The defendant, on the other hand, contends the policy is void due to a material misrepresentation, or in the alternative, that the plaintiffs are bound by their representation of January 3, 1946, and in that event, plaintiffs’ recovery should be based upon a valuation of Two Thousand Dollars (\$2,000.00).

Taking up the plaintiffs’ contention first, it will be noted they are basing their claim upon values reported after the loss occurred. This approach would be contrary to, and in direct conflict with subdivision (B) of paragraph 8 of the policy heretofore quoted. A reading of this section indicates that the period of grace for the filing of reports of values under no circumstances extends

to a time after the fire loss, even if it is assumed that the thirty day grace period had not expired. However, strict enforcement of such a provision would preclude recovery under a new policy until an evaluation had been made, and it has been held in cases dealing with similar policies that where the loss occurs before a required inventory is taken, but within the grace period, or where no grace period is provided, within a reasonable time, an inventory or report made after the loss is sufficient upon which to base recovery. [27] *National Liberty Insurance Co. v. Norman*, 4 Cir., 11 F. (2d) 59; *Schenley Distillers Corp. v. U. S. Fire Ins. Co.*, 2 Cir., 90 F. (2d) 633.

In following through plaintiffs' contention, it is necessary to determine whether or not the thirty day grace period had expired.

A policy takes effect from its date, unless it be otherwise stated. *Union Ins. Co. v. American Fire Ins. Co.*, 107 Cal. 327, 40 Pac. 431. The policy was effective in December, 1945. A report of values was due on the last day of each month of the policy term, so a report of values was due under the new policy, as well as on the old policy, on December 31, 1945. If it be argued that no report could be expected since the policy covered only one day in the month of December, this departure from the express words of the contract would put us in the difficult position where we must determine how and where to draw the line. Would a report be due if the effective date were December 30, or December 20, or December 16? Must the policy have been effective a week, or half a month, or the whole month? The words of the policy are clear and unambiguous in this regard—under the new policy a report was due on December 31, 1945.

Plaintiffs' report of January 3rd was within the terms of paragraph 8 (A), and since they made no other report during January, the conclusion is inescapable that the single report covered both the old and the new policies. They stated that the property was worth Two Thousand Dollars (\$2,000.00) on December 31, 1945. If it was worth Two Thousand Dollars (\$2,000.00) under the old policy on that day, it was worth no more under the new one. They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied on to compute the company's liability. The mere circumstance that the report they made was also within the terms of the old policy, which was a separate and distinct contract, does not alter the fact that it was within the terms of the new policy. To hold otherwise would enable the plaintiffs to profit by their own wrong, and would void the policy as hereinafter discussed. [28]

If plaintiffs' contention that the January 3rd report was not made under the new policy is accepted, they are in complete default, since the thirty day grace period expired on January 30, 1946. Where there has been no evaluation at all, and a definite period is set within which to state the value; a failure by the insured to comply with the requirement is sufficient ground for the insurer to avoid all liability. *Royal Insurance Co. v. Kline Bros.*, 2 Cir., 198 F. 468; *Istrouma Mercantile Co. v. Northern Assurance Co.*, 183 La. 855, 165 So. 11.

Even if the statement of falsely low values would not be grounds for avoidance when the insurer protects him-

self with an "honesty clause" and does not rely on its accuracy, nevertheless some figure must be given in order to create a base for calculating the liability after loss, and to adjust premiums. It is material that the declaration of values be within the period of grace, for if the insured could wait until the risk was past, and then understate the value of the property which had been subject to the risk, he would get the benefit of full coverage with an unjustly low premium. *Atlantic Fruit Co. v. Hamilton Fire Ins. Co.*, 251 N. Y. 98, 167 N. E. 184; cf. *Rivaz v. Gerussi Bros.*, 6 Q. B. D. 222, 50 L. J. N. S. 176.

Although an ambiguous insurance policy must be interpreted most strongly against the insurer, *Fritz v. Metropolitan Life Ins. Co.*, 50 Cal. App. (2d) 570, 123 P. (2d) 622, we cannot create an ambiguity where none exists. *American National Bank v. Service Life Ins. Co.*, 120 F. (2d) 579, 137 A. L. R. 1148; *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 183 U. S. 402, 22 S. Ct. 124, 46 L. Ed. 253. By no stretch of the imagination can the February report be brought within the terms of the phrase "the last report of values filed prior to the loss". It was filed after the loss. The only report of values filed prior to the loss was filed on January 3, 1946.

Passing now to the contention of the defendant to the effect that the policy is void due to a material misrepresentation [29] or concealment of values. If the representations or concealments are material, then of course

the policy is void. *Gates v. General Casualty Co.*, 9 Cir., 120 F. (2d) 925; *Strangio v. Consolidated Indemnity & Insurance Co.*, 9 Cir., 66 F. (2d) 330. But the misrepresentation must be material to the risk, or the rights and liabilities arising from the contract. It must be such that "it would have influenced the underwriter either not to underwrite at all, or not to underwrite, except at a higher premium". *Hare & Chase, Inc. v. National Surety Co.*, 49 F. (2d) 447, 457; *Transcontinental Ins. Co. v. Minning*, 135 F. (2d) 479, 481.

Under the second policy, the plaintiffs reported a value only one fourteenth of the true worth of the insured property. But if the insurer had known this would it have acted differently? The policy is so drawn that any understatement of value limits the recovery, without a proportionate saving in premiums. For instance, under the old policy the premium rate was ninety-six cents per One Hundred Dollars (\$100.00) insured. Since the minimum premium was One Hundred Dollars (\$100.00), plaintiffs paid at the rate of Two Dollars and Fifty Cents (\$2.50) per One Hundred Dollars (\$100.00) insured by stating an average value of Four Thousand Dollars (\$4,000.00). The defendant received a premium two and one-half times as large as was earned by the risk assumed. If the plaintiffs state Two Thousand Dollars (\$2,000.00) as the value, they must pay a premium at the rate of Five Dollars (\$5.00) per One Hundred Dollars (\$100.00) insured. Only the insurer can profit by the insured's choosing to bear such a large part of the risk, and no in-

surer would rescind a policy under these circumstances. I find that the understatement was immaterial. *Jeffords v. Tokio Marine & Fire Ins. Co.*, 123 S. C. 467, 117 S. E. 79, 81.

If the under-evaluation during the term of the new policy is immaterial, it is even less material that plaintiffs understated values under the old one. The California Insurance Code §334, in treating with negotiations before the execution of the contract, provides: [30]

“Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.”

No disadvantageous fact was concealed from the defendant. It gained by plaintiffs' understatements. Counsel suggests that had the company known the actual value of the property, it would have demanded and received a larger deposit premium. But the plaintiffs' course of conduct in 1945, in declaring low values, would have indicated that the premium of One Hundred Dollars (\$100.00) already received was going to be more than adequate for 1946. There was no reason to demand more.

Rivaz v. Gerussi Bros., 6 Q. B. D. 222, 50 L. J. N. S. 176, on which the defendant relies strongly did not present the same problem as we have here. In that case, under a prior policy, the insured had waited until after

the risk had passed before stating the value of the merchandise covered; then he stated a falsely low value to obtain a low premium rate. This was a clear breach of trust since he actually owed a larger premium. A material misrepresentation under a prior connected policy is sufficient to void the policy sued on. *Solomon v. Federal Ins. Co.*, 176 Cal. 133, 167 Pac. 859; *Eddy v. National Union Indemnity Co.*, 9 Cir., 78 F. (2d) 545, 80 F. (2d) 284; *Sun Ins. Co. v. Roy* [1927], 1 D. L. R. 17, 62 A. L. R. 818. But where the misrepresentation or concealment is immaterial, it does not create grounds for rescission or avoidance. In the present case an understatement does not breach the trust since the insurer is unharmed. The representation is of no importance to the insurer, except to calculate the premiums due at the end of the year. The insurer has committed himself to accepting a fluctuating scale of values but is protected by the "honesty clause" whatever value is declared.

I therefore find that the plaintiffs are entitled to recover upon the basis of their report of January 3, 1946. [31]

Counsel for plaintiffs is directed to submit forthwith proposed findings and judgment in accordance with this opinion.

Dated: This 19 day of February, 1947.

BEN HARRISON

Judge

[Endorsed]: Filed Feb. 19, 1947. [32]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 6th day of January, 1947 before the Court sitting without a jury, a jury having been expressly waived, George Penney appearing for the plaintiffs and Hindman and Davis by E. Eugene Davis appearing for the defendant, a written stipulation of facts having been entered into between the parties, and oral and documentary evidence having been introduced, and the cause submitted for decision, the Court now makes its findings of fact as follows:

I.

That it is true that the plaintiffs were partners doing business under the fictitious name of Fullerton Manufacturing Co. and were and now are citizens of the State of California. [33]

II.

That the defendant was and now is a corporation organized under and by virtue of the laws of the State of Connecticut, and was and now is a citizen of the State of Connecticut, and was authorized to write fire insurance under and by virtue of the laws of the State of California pertaining to insurance companies.

III.

That the amount in controversy exclusive of interest and costs exceeds the sum of \$3000, and the court has jurisdiction based upon diversity of citizenship of the parties hereto as well as the amount in controversy, the same being in excess of \$3000.

IV.

That on or about the 31st day of December, 1945, for a valuable consideration, the defendant issued a certain fire insurance policy on the California standard form with a provisional reporting endorsement thereon, in which it insured the property of the plaintiffs in an amount not to exceed \$15,000. That said policy of insurance provided as follows:

“ ‘Value Reporting Clause.’

(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the [34] locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.

“‘Full Reporting Clause.’ Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any) which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above described, less the amount of specific insurance, if any, actually in force at that location at the time of such report. Liability for loss hereunder occurring at any new location where, since filing the last report, the insured may have property as above described (except as provided in ‘Value Reporting Clause,’ paragraph 8) shall be apportioned in a like manner, except that the proportion used shall be the relation that the values at all locations reported prior to the loss, less the amount of reported specific insurance, if any, bear to the actual cash value of the property above described at all locations, less the amount of specific insurance, if any, actually in force at the time of such report. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss.” [35]

V.

That on or about the 14th day of February, 1946, and while said policy of insurance was in full force and effect, a fire occurred on the premises of the plaintiffs resulting in a loss in the amount of \$27,253.18.

VI.

The Court further finds that the defendant issued a policy of insurance in December, 1944 in the provisional amount of \$30,000 on which a premium was paid. That while said policy was in full force and effect the plaintiffs requested that the provisional limit be reduced to \$15,000, which was accordingly done. That under said policy of insurance the plaintiffs reported to the defendant at the end of each month the values on hand for the preceding month. That the plaintiffs reported to the defendant on the 31st day of January, 1945 that the actual cash value of the property at the plaintiffs' place of business was \$5000 when as a matter of fact the actual cash value was the sum of \$19,856; that on the 28th day of February, 1945 plaintiffs reported values of \$6000 when as a matter of fact the actual cash value was the sum of \$21,535; that on the 31st day of March, 1945 plaintiffs reported values of \$7000 when as a matter of fact the actual cash value was the sum of \$23,214; that on the 30th day of April, 1945 plaintiffs reported values of \$8000 when as a matter of fact the actual cash value was the sum of \$24,820; that on the 31st day of May, 1945 plaintiffs reported values of \$4000 when as a matter of fact the actual cash value was the sum of \$25,331; that on the 30th of June, 1945 plaintiffs reported values of \$4000 when as a matter of fact the actual cash value was the sum of \$25,842; that on the 31st day of July, 1945 plaintiffs reported values of \$4000 when as a matter of fact the actual cash value was the sum of \$26,353; that on the 31st day of August, 1945 plaintiffs reported values of \$2000 when as a matter of fact the actual cash value was the sum of [36] \$26,864; that on the 30th day of September, 1945 plaintiffs reported values of \$2000 when

as a matter of fact the actual cash value was the sum of \$27,375; that on the 31st day of October, 1945 plaintiffs reported values of \$2000 when as a matter of fact the actual cash value was the sum of \$27,886; that on the 30th day of November, 1945 plaintiffs reported values of \$2000 when as a matter of fact the actual cash value was the sum of \$28,338.33; and on the 3rd day of January, 1946 plaintiffs reported the cash value of the property as of December 31, 1945 to be the sum of \$2000 when in truth and in fact the actual cash value was, as of December 31, 1945, the sum of \$28,140.72.

VII.

The Court further finds that the plaintiffs failed to report the cash value of the property on the 31st day of January, 1946, but on February 26 the plaintiffs reported that the true value of the property at the time of the fire was \$29,625.20. That a sworn proof of loss was filed by the plaintiffs on the 16th day of August, 1946 setting forth the value of the property at the time of the loss in the amount of \$29,625.20 and the damage to the property in the amount of \$27,253.18 and claiming a loss under the policy in the amount of \$13,798.50. The Court finds that the defendant admitted the amount of the loss but denied that any recovery was due under the terms and conditions of the policy.

VIII.

The Court finds that under the terms and conditions of the policy in effect at the time of the fire the re-

port made on January 3, 1946, determines the liability of the defendant to the plaintiffs and that the defendant's liability shall be in the proportion that \$2000/28,140.78 X the loss of \$27,253.18 and that the limit of coverage amounts to \$1936.92.

IX.

The Court further finds that the plaintiffs, in reporting [37] undervaluations during the term of the policy in existence in 1945 did not breach the conditions of the policy because the insurer was not harmed by the statements of undervaluation. The representations as to values were far less than the minimum earned premium.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the Court finds:

I.

That the plaintiffs are entitled to judgment against the defendant in the sum of \$1936.92, together with interest thereon from the 14th day of May, 1946 at the rate of 7 per cent per annum, together with their costs of suit.

Judgment is hereby ordered to be entered accordingly.

Dated this 25 day of March, 1947.

BEN HARRISON

Judge [38]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 25, 1947. [39]

In the District Court of the United States
Southern District of California
Central Division
No. 5814-BH

L. WALLACE and E. B. LANDRY, a copartnership,
doing business as FULLERTON MANUFACTUR-
ING CO.,

Plaintiffs,

vs.

WORLD FIRE AND MARINE INSURANCE COM-
PANY OF HARTFORD, CONNECTICUT, a cor-
poration,

Defendants.

JUDGMENT

This cause came on regularly for trial after due and proper notice thereof on the 6th day of January, 1947, in the United States District Court, Southern District of California, Central Division, the Honorable Ben Harrison, Judge Presiding, and evidence having been introduced, both oral and documentary, a written stipulation of facts having been entered into between the parties, and the cause having been submitted, and findings of fact and conclusions of law having been duly made, it is now therefore Ordered, Adjudged and Decreed that the plaintiff have and recover from the defendant the sum of \$1936.92, together with interest thereon at the rate of 7 per cent per annum from the 14th day of May, 1946, together with costs in the amount of \$17.80.

Dated at Los Angeles, California, this 25 day of March, 1947.

BEN HARRISON

Judge

Judgment entered Mar. 25, 1947. Docketed Mar. 25, 1947. Book C. O. 42, page 303. Edmund L. Smith, Clerk; by Murray E. Wire, Deputy.

[Endorsed]: Filed Mar. 25, 1947. [40]

[Title of District Court and Cause]

SUBSTITUTION OF ATTORNEYS

Come now the plaintiffs and substitute as their attorneys in the above-entitled action William H. Levit and Benjamin J. Goodman in place and instead of George Penney.

Dated: March 27, 1947.

L. WALLACE and E. B. LANDRY,
a co-partnership, doing business as
FULLERTON MANUFACTURING CO.

By L. Wallace

I, George Penney, attorney of record for plaintiffs in the above-entitled action, do hereby consent and agree to the substitution of William H. Levit and Benjamin J. Goodman as attorneys for the plaintiffs in my place and in my stead. [41]

Dated: March 27, 1947.

GEORGE PENNEY

We, the undersigned, William H. Levit and Benjamin J. Goodman, hereby consent and agree to the foregoing substitution and consent and agree to act as attorneys for the plaintiffs.

Dated: March 27, 1947.

WILLIAM H. LEVIT
BENJAMIN J. GOODMAN

[Endorsed]: Filed Mar. 28, 1947. [42]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL AND MOTION TO
OPEN JUDGMENT AND TAKE ADDITIONAL
TESTIMONY PURSUANT TO RULE 59

The plaintiffs move the court as follows:

I.

To grant a new trial on all of the issues on the following grounds:

(a) Accident or surprise which ordinary prudence could not have guarded against;

(b) Newly-discovered evidence material to the plaintiffs, which they could not with reasonable diligence have discovered and produced at the trial;

(c) Insufficiency of the evidence to justify the decision and judgment of the court in the following particulars:

Under the policy of insurance #4801476, issued [43] by defendant to plaintiffs on December 31, 1945, no report of values was required to be filed by plaintiffs thereunder until thirty days after the 31st day of January, 1946; that the report of values filed by plaintiffs on January 3, 1946, was a report filed under a prior policy issued to plaintiffs by defendant on December 31, 1944, being policy #013121 which expired at noon on December 31, 1945, and which said report covered the period under said prior policy from December 1, 1945, to December 31, 1945, and which said report had no bearing on said policy #4801476 and was not a report of values under said policy; that under the terms of said policy #4801476, and since no report of values had been filed under said policy prior to said loss, and since no report of values was delinquent under said policy (paragraph 9—full reporting clause) prior

to said loss, plaintiffs were entitled to recover the proportion of such loss that the limit of liability specified in said policy bore to the actual cash value of the property described in said policy at the time of loss, to-wit, the sum of Thirteen thousand, seven hundred ninety-eight dollars and fifty cents (\$13,798.50).

That in any event and even though said policy #4801476 be construed to have required plaintiffs to have filed a report of values thereunder as of the 31st day of December, 1945, with a grace period of thirty days thereafter, the only penalty provided in said policy for failure to file said first report of values due under said policy within the time specified is the following:

“8. ‘Value Reporting Clause.’ . . . (b) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover . . . for not more than the amounts included in the last report of values filed [44] prior to the loss . . . ;”

that since no report of values was filed by plaintiffs under said policy prior to said loss, the insurer is liable pursuant to paragraph 9 (full reporting clause) for the proportion of such loss that the limit of liability specified in the policy bears to the actual cash value of the property described at the time of loss, to-wit: the sum of Thirteen thousand, seven hundred ninety-eight dollars and fifty cents (\$13,798.50).

(d) Error in law occurring at the trial in the following particulars:

That the decision is against the law for the same reasons specified immediately hereinabove under specification I(c).

II.

To open the judgment and take additional testimony in the following respects:

To introduce in evidence on behalf of plaintiffs that certain written report of values dated January 3, 1946, which said report was filed by the plaintiffs with the defendant under policy #013121 covering the period from December 1, 1945, to and including December 31, 1945, and which said report of values is specifically referred to in paragraph VI of the agreed statement of facts, and in the opinion of the trial court herein, and in paragraphs VI and VIII of the findings of fact and conclusions of law herein, but which said report was not introduced in evidence at the trial of this case.

This motion is based upon the pleadings and papers on file herein, upon the minutes of the court, and upon the affidavits of Benjamin J. Goodman and George Penney filed herewith.

WILLIAM H. LEVIT and
BENJAMIN J. GOODMAN

By Benjamin J. Goodman

Attorneys for Plaintiffs [45]

NOTICE OF MOTION

To World Fire and Marine Insurance Company of Hartford, Connecticut, and to Hindman & Davis, Its Attorneys:

Please Take Notice that the undersigned have filed, or are about to file, the above motion for a new trial with the above-entitled court, and that said motion will be brought on for hearing at a date to be fixed by the court.

Dated: March 28, 1947.

WILLIAM H. LEVIT &
BENJAMIN J. GOODMAN

By Benjamin J. Goodman
Attorneys for Plaintiffs

608 South Hill Street
Los Angeles 14, California [46]

STATEMENT OF REASONS AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION

1. The grounds of accident or surprise, newly discovered evidence, and the motion to reopen the judgment and take additional testimony.

The purpose of the motion on these grounds is to reopen the judgment so that the report of values of January 3, 1946 may be introduced in evidence. As appears from the affidavits filed herewith, the report was not offered in evidence at the trial, because of the inadvertence of plaintiffs' former counsel. On March 18, 1947, after the Court's opinion was rendered, the omission was discovered and called to said counsel's attention by plaintiffs' present counsel, with a request that he immediately move to re-

open the case. Before so doing, he attempted to obtain a stipulation from defendant's counsel allowing the report in evidence. This failed, and at about the same time (March 25) the findings were signed and the judgment entered. This was immediately followed by the substitution of counsel and the filing of this motion.

It cannot be denied that this report goes to the very essence of both plaintiffs' and defendant's case. It is specifically referred to in the Agreed Statement of Facts, the Court's opinion and the Findings of Fact. The Court's opinion is founded on the premise that this report applied to the new policy (the policy in suit). As stated in the opinion "* * * the conclusion is inescapable that the single report covered both the old and the new policies." Having so construed the report, the Court concluded that recovery was limited by the values specified in said report.

A copy of the report is attached to this Motion as an exhibit, and it appears therefrom that by its terms it was made [47] under and refers only to policy 013121 (the old policy). It is submitted that had the Court had the opportunity to examine the report before reaching its decision it would have so concluded.

Under Rule 59, in an action tried without a jury, the trial court has authority to grant a new trial "for any of the reasons for which rehearings have heretofore been granted in suits in equity", and "may open the judgment * * *, take additional testimony * * * and direct the entry of a new judgment."

An examination of the authorities supports the proposition that the trial court has ample authority under the situation here presented to open the judgment, permit the introduction of the report and then enter a new judgment.

In the case of *Moore v. United States*, 59 Fed. Supp. 660, the District Court filed its opinion on August 18, 1944, and judgment was entered dismissing the complaint on September 21, 1944. On September 28, 1944, plaintiff filed a motion to set aside the judgment and to reopen the case and for leave to file an amended complaint. The District Court granted the motion stating:

“The first question which should be considered is the right of the court to set aside a judgment duly entered. It is a well recognized rule of reason and justice that a party is entitled to his day in court, but there must be an end to litigation. This case had been pending several months before it came to trial, the memorandum opinion was handed down on August 18, 1944, but no steps were taken before judgment was entered to remedy the defect pointed out in the opinion. A judgment should not be lightly set aside.

“However, it is well recognized that where justice requires, formalities of procedure should not interfere. A new trial may be granted, and the court may open the judgment and take additional testimony for any of the reasons for which rehearings have been granted in suits in equity in the courts of the United States. Federal Rules of Civil Procedure, rule 59, 28 U. S. C. A. following sec. 723 C.

“Consequently, there is no need to let the judgment stand in the way, if the justice of this case requires that it be reopened for further proceedings.”

Since Rule 59 refers to the granting of rehearings in suits in equity, it is pertinent to refer to the case of *Hazeltine [48] Corp. v. Wildermuth* (C. C. A. 2) 35 Fed. (2nd) 733, which was an equity suit involving a situation

quite similar to that here presented. There the District Court had entered a decree in a patent infringement suit for the plaintiff. The defendant appealed to the Circuit Court where the decree was affirmed, and a petition for reargument denied. Before the Circuit Court issued its mandate to the District Court, the defendant appellant moved the Circuit Court for an order to show cause why the cause should not be remitted to the District Court for the taking of further evidence. According to the opinion, the evidence sought to be introduced was a physical exhibit which was described in the evidence at the trial by a drawing. (This is directly analogous to the instant case where the report of January 3 was referred to in the Agreed Statement.) The Circuit Court granted the Motion stating:

“The appellant seeks to offer a physical exhibit, which was described in the evidence at the trial by a drawing. Whether a rehearing should be granted or denied rests with the trial judge. * * * The Circuit Court of Appeals cannot set aside a decree on newly discovered evidence. * * * We may, however, grant permission to the District Court to hear and determine such application for a rehearing, exercising a sound discretion. * * * This should be done by asking the District Court to consider the application for a rehearing on the newly discovered proofs.”

While the Circuit Court did not instruct the District Court to admit the exhibit, it is clear from the opinion that the District Court had authority, in the exercise of a sound discretion to do so.

And in the case of *Folmer Graflex Corp. v. Graphic Photo Service*, 45 Fed. Supp. 749, a new trial was granted under Rule 59 because the Court felt that it had not given sufficient consideration to certain authorities.

We believe that the foregoing authorities establish that this Court has ample authority to grant plaintiffs' motion on the grounds stated. Whether or not it will do so is, of course, a [49] matter for the Court to determine in the exercise of a sound discretion. In this connection, we respectfully request the Court to bear in mind that (1) the report in question is admittedly the most vital evidence in the case both for plaintiffs and defendant, (2) it formed the very basis of the court's decision, (3) its admission at this time can be accomplished without causing injury to the defendant, or any undue inconvenience or delay, and (4) even though the Court concludes that with the report in, its decision will remain unchanged, plaintiffs should be permitted to have the record complete and in accordance with the facts. In this connection, we believe the following language from the case of *Bowles, etc. v. Six States Coal Corp.*, 64 Fed. Supp. 651, which involved an application to reopen a case and take additional evidence should guide the Court in passing upon this motion:

"The proceeding was filed on December 29, 1944, and counsel for the plaintiff has certainly had ample opportunity or time to properly prepare said case for trial, and there is no justification or reason existing for the oversight which was allowed to occur by counsel for the plaintiff. However, a lawsuit is not a battle or contest of wits; it is a fair struggle for a

just decision, and although considerable inconvenience and expense has been caused the defendants due to the inadvertence on the part of the counsel for the plaintiff, the court does not see how any injury can be done to the defendants or any substantial injustice arise by permitting the introduction of the testimony desired by the plaintiff * * *.

“It is the primary duty of the court to render justice and fairness to all persons concerned in any litigation, and the Court therefore feels in the exercise of this discretion that in order for the issues joined in this proceeding to be fairly tried and adjudicated, the request of the plaintiff should be granted.”

2. The grounds of insufficiency of the evidence and error in law.

It is plaintiffs' contention that the report of January 3, 1946 was not a report under the new policy and that no report of values was due under that policy until 30 days after January 31, 1946. If this be correct, then as pointed out in the Court's [50] opinion citing the cases of *National Liberty Insurance Co. v. Norman*, 11 Fed. (2nd) 59, and *Schenley Distillers Corp. v. U. S. Fire Insurance Co.*, 90 Fed. (2nd) 633, plaintiffs were entitled to file their first report after the loss and to recover on the basis of the values set forth in that report.

However, even if it be conceded that the Court was correct in its conclusion that a report was due under the new policy on December 31, 1945, the inception date of

the policy, and which report became delinquent on January 31, 1946, it is submitted that plaintiffs are nevertheless entitled to recover on the basis of the report filed after the loss.

The Court considered this possibility in its opinion and rejected it on the ground that failure to file a report within the period required by the policy "is sufficient ground for the insurer to avoid all liability," citing *Royal Insurance Co. v. Kline Bros.*, 198 Fed. 468, and *Istrouma Mercantile Co. v. Northern Assurance Co.*, 165 So. 11. But those cases dealt with entirely different types of policies and reports, and in each case the policy contained a specific provision voiding it for failure to keep or file the required reports. The instant policy not only fails to contain an avoidance clause, but specifically provides what the penalty shall be for delinquency in filing reports. Paragraph 8 B provides that in the event loss occurs while the assured is delinquent in reporting, the recovery shall be limited to "the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein." Here we have clear and unambiguous language prepared by the company specifying in detail the only penalty for delinquent filing. And since the latter portion of the clause specifically mentions delinquency in filing the first report of [51] values, it is clear that the first portion of the clause by referring to the "last report of values" can have no application to delinquency in filing the first report,

and that the only penalty therefor is that specified in the last portion of the clause, viz., that the policy shall "cover only at the locations specifically named herein." Since the language was drawn by the insurer and since it is unambiguous, it is submitted that an additional penalty (avoidance) may not be added thereto.

However, says the Court in its opinion, in any event a report of values must be filed during the grace period, "for if the insured could wait until the risk was past, and then understate the value of the property which had been subject to the risk, he would get the benefit of full coverage with an unjustly low premium," citing *Atlantic Fruit Co. v. Hamilton Fire Insurance Co.*, 167 N. E. 184. But that case dealt with the old form of provisional reporting policy which did not contain the "Value Reporting Clause" or the "Full Reporting Clause." In that case, only one policy was involved and the insured had repeatedly underreported values thereunder. The Court held that the policy was thereby voided. But that case is not authority under the form involved in this suit. With its "Value Reporting Clause" and "Full Reporting Clause," the insurer has anticipated understatements of value and provided in detail what the penalty therefor shall be, and avoidance is not included therein. There has been no underreporting of values under the policy in suit. At most there has been a delay in filing the first report, and as noted above, the only penalty provided has no application, as no claim is being made for loss at any location other than that specified in the policy.

The form is meticulously drawn in order to fully protect the insurer against understatements and delinquencies from the time the first report of values is filed. Had the insurer [52] desired the same protection during the initial period from the inception date of the policy to the date of filing the first report, it would have been a simple matter to have provided in the policy for a report of values to have been filed on the inception date, and to have limited recovery to those values during that initial period. For reasons best known to it, the insurer did not see fit to so provide.

It is therefore submitted that the only limit of liability applicable in this case is the last sentence of paragraph 9 (Full Reporting Clause) which provides that the "Company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss." Applying that formula to the instant case, plaintiffs are entitled to recover the sum of \$13,798.50.

Respectfully submitted,

WILLIAM H. LEVIT

BENJAMIN J. GOODMAN [53]

Received copy of the within Motion this 31 day of March, 1947. E. Eugene Davis.

[Endorsed]: Filed Mar. 31, 1947. [54]

[Title of District Court and Cause]

AFFIDAVIT OF BENJAMIN J. GOODMAN IN
SUPPORT OF MOTION FOR NEW TRIAL
AND TO OPEN JUDGMENT FOR FURTHER
TESTIMONY

State of California

County of Los Angeles—ss.

Benjamin J. Goodman, being first duly sworn, deposes and says:

That on or about March 10, 1947, your affiant was consulted by the plaintiffs in the above-entitled action for the purpose of determining whether or not plaintiffs should take any further action in the prosecution of their claim against the defendant; that your affiant communicated by telephone with Mr. George Penney, attorney for the plaintiffs, and requested an appointment for a conference with Mr. Penney, Mr. L. Wallace, one [55] of the plaintiffs in the above-entitled action, and your affiant. That an appointment was made, and Mr. L. Wallace and your affiant had a conference with Mr. Penney, which conference was held at the office of Mr. Penney within a few days after March 10, 1947.

That your affiant inquired of Mr. Penney at said conference if he had a copy of the report of values dated January 3, 1946, and referred to in the opinion of the trial court; that your affiant was informed by Mr. Penney that he did not have a copy of the report; but that he was of the opinion that a copy was introduced in evidence in the above-entitled action at the trial thereof.

That after the conference with Mr. George Penney, affiant requested of the plaintiffs to secure for him a copy

of the report of values dated January 3, 1946, and a copy was delivered to your affiant prior to March 18, 1947. That attached hereto, marked "Exhibit A," and by reference made a part hereof, is a true and correct copy of said report of values dated January 3, 1946, being the same report of values referred to in paragraph VI of the agreed statement of facts, and in the opinion of the trial court herein, and in paragraphs VI and VIII of the findings of fact and conclusions of law herein.

That, on March 18, 1947, your affiant received from Mr. Penney a copy of proposed findings of fact and conclusions of law in the above-entitled action which were filed with the court on or about March 18, 1947. That at the same time there was delivered by Mr. George Penney to affiant a copy of the following letter addressed to one of the plaintiffs, Mr. L. Wallace:

"This is to advise you that I have this day filed the findings of fact and conclusions of law.

"I was unable to answer Mr. Davis's inquiry as to whether or not you intend to take an appeal, and I anticipate that he will make certain objections [56] to the findings and that we probably will have another court hearing to settle the question of the objections. I am trying to avoid any unnecessary expense on your part, and if you decide that you do not intend to appeal I would suggest that you notify me immediately."

That thereafter, on March 18, 1947, affiant talked to Mr. George Penney on the telephone and was advised by him that if the plaintiffs intended to take an appeal in the above-entitled action Mr. Davis, counsel representing

defendant, would probably want to file objections to the findings of fact and conclusions of law.

That thereafter, on March 18, 1947, affiant personally went to the office of the Clerk of the United States District Court and there examined the records and files in this action, including the transcript of proceedings at the trial and the exhibits introduced in evidence; that your affiant then learned for the first time that the report of values dated January 3, 1946, had not been introduced in evidence at the trial.

That immediately upon affiant returning to his office on March 18, 1947, affiant addressed a letter to Mr. George Penney in which the affiant stated as follows:

"This afternoon I went down to the office of the Clerk of the District Court to examine the file and records in the above-entitled case. I examined the exhibits and read the Reporter's Transcript of the evidence and stipulations taken at the trial on the agreed statement of facts.

"I wanted to make sure that the record contained the original or a copy of the report made by our client on January 3, 1946, covering the period from December 1, 1945, to December 31, 1945, which refers only to policy #013121, which expired at noon, December 31, 1945. I [57] found that the report was not introduced in evidence, and that there is no reference in the Reporter's Transcript or in the agreed statement of facts to the report as pertaining to the policy #013121, which would indicate that the report was filed in reference to that policy alone and not to the new policy which was introduced in evidence as plaintiff's exhibit No. 1.

“The failure to introduce the original report, or a copy thereof, is probably due to the inadvertence of both counsel, and I feel that this report is very material on the issues. The agreed statement of facts refers to the report but does not indicate that the report was applicable to the old policy, and I therefore assume that Judge Harrison interpreted that portion of the agreed statement of facts pertaining to the report as applicable to both policies.

“It is Mr. Wallace’s intention to take an appeal in this case, and an attempt should be made to place in evidence the report of January 3, 1946. There are several ways in which this attempt can be made.

“On behalf of Mr. Wallace, I request that a motion be instituted to reopen the case for the sole purpose of introducing in evidence the original or a correct copy of the report of January 3, 1946. This motion should be supported by an affidavit setting forth a true and correct copy of the report so that it will appear in the record in the event that Judge Harrison denies the motion. The motion should be predicated upon the ground that the original report of January 3, 1946, was omitted because of inadvertence of counsel.

“If this motion is denied, then another will have to be made by way of motion for new trial. [58]

“I feel that in view of the fact that you have represented the plaintiff in this case up to this point, if the motion was made and presented by you rather than by substituted counsel, there would be a greater chance of the motion being granted. If the motion is denied, after judgment is entered, and I am sub-

stituted in your stead, I will then institute a motion for new trial for the purpose of trying to introduce in evidence the report referred to. . . .

"If I can be of any service to you in the preparation of the motion and affidavit, do not hesitate to call upon me, and I will be glad to render any service that I can in the premises. I am enclosing for your files several copies of the report in question, which can be used as exhibits and attached to the affidavit."

That on March 20, 1947, affiant received in due course of mail a letter from Mr. George Penney, in which he stated as follows:

"Replying to your communication of March 18, I have this day written to Mr. Davis of Hindman & Davis asking him to stipulate that a copy of the report for the period ending December 31, 1945 be admitted in evidence. I am satisfied that this can be done by stipulation, and I shall let you know as soon as I have received a reply from him."

That on March 24, 1947, affiant addressed another letter to Mr. Penney, as follows:

"Will you be good enough to advise me of the time and place set for the hearing on the settlement of the findings of fact and conclusions of law. I would like to avail myself of the opportunity of appearing in the courtroom at that time without participating in any of [59] the proceedings."

That on March 26, 1947, not having heard from Mr. Penney, your affiant telephoned Mr. Penney and was thereupon advised by Mr. Penney that the findings of fact and conclusions of law had been signed and judg-

ment had been entered on March 25, 1947, and that Mr. E. Eugene Davis, counsel for defendant, had refused to stipulate to the introduction in evidence of the report of values dated January 3, 1946. That affiant had no source of knowledge or information other than herein stated that the findings of fact and conclusions of law were signed or were about to be signed, and the judgment entered, and that your affiant relied upon the letter of Mr. George Penney dated March 19, 1947, above referred to, and verily believed that Mr. Davis would stipulate to the introduction in evidence of the report of values of January 3, 1946, or in the alternative that Mr. Penney would make a timely motion to reopen the case for the purpose of introducing said report of values into evidence prior to the signing of the findings of fact and entry of the judgment.

Further, affiant saith naught.

BENJAMIN J. GOODMAN

Subscribed and sworn to before me this 28th day of March, 1947.

(Seal)

BYRON SCHWARTZ

Notary Public in and for the County of Los Angeles,
State of California [60]

EXHIBIT A

Standard Forms Bureau Forms 448 (Mar. 1936)
(PROVISIONAL FORM)STATEMENT OF VALUES AND SPECIFIC
INSURANCE

For the period beginning Dec. 1st, 1945, and ending December 31st, 1945, under terms of Policy No. 013121 of the The World Fire and Marine Insurance Co. issued to Fullerton Manufacturing Company by M. C. Lewis & Company Agent at Los Angeles, California

Loca- tion No.	State	Forms 1 and 3	Form 1	Form 3	Forms 1 and 3	For Com- pany's Use
		Exact Location of any Prop- erty Insured	Total Value in each location as of last day of period shown above	Total weekly average value in each location for period shown above	Specific insurance (if any) in each location on last day of period shown above	
	Calif.	343 East Santa Fe Ave. Fullerton, Cali- fornia	\$2,000.00			

The undersigned certifies the foregoing report of values and of specific insurance, for the period named, to be correct.

Jan. 3, 1946

Dated

FULLERTON MANUFACTURING COMPANY
by Gladys Jennings [61]

Received copy of the within Affidavit this 31st day of March, 1947. E. Eugene Davis.

[Endorsed]: Filed Mar. 31, 1947. [62]

[Title of District Court and Cause]

AFFIDAVIT OF GEORGE PENNEY IN SUPPORT
OF MOTION FOR NEW TRIAL AND TO
OPEN JUDGMENT FOR FURTHER TESTI-
MONY

State of California

County of Los Angeles—ss.

George Penney, being first duly sworn, deposes and says:

That your affiant was, up to and including March 27, 1947, the attorney of record for the plaintiffs in the above-entitled action.

That your affiant has read the affidavit of Benjamin J. Goodman attached to plaintiffs' motion for a new trial and that, insofar as the same refers to conversations and correspondence had between your affiant and Benjamin J. Goodman, it is in accordance with the facts. [63]

That through inadvertence of your affiant, your affiant neglected to have a true copy of said report of values dated January 3, 1946, attached to the agreed statement of facts herein as an exhibit or to offer the same in evidence on behalf of plaintiffs at the trial of this case.

GEORGE PENNEY

Subscribed and sworn to before me this 28th day of March, 1947.

(Seal)

BENJAMIN J. GOODMAN

Notary Public in and for the County of Los Angeles,
State of California [64]

Received copy of the within Aff. this 31 day of March, 1947. E. Eugene Davis.

[Endorsed]: Filed Mar. 31, 1947. [65]

[Minutes: Monday, June 2, 1947]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for hearing motion of plaintiffs for a new trial pursuant to notice filed March 31, 1947; Wm. H. Levit, Esq., appearing as counsel for the plaintiffs; E. Eugene Davis, Esq., appearing as counsel for the defendant;

It is ordered that the said motion is denied. [66]

[Title of District Court and Cause]

SUBSTITUTION OF ATTORNEYS

Come now the plaintiffs and substitute as their sole attorney in the above entitled action Benjamin J. Goodman in place and in stead of Benjamin J. Goodman and William H. Levit.

Dated: 6/14, 1947.

L. WALLACE and E. B. LANDRY,
a co-partnership, doing business as
FULLERTON MANUFACTURING CO.

By L. Wallace

I, William H. Levit, one of the attorneys of record for plaintiffs in the above entitled action, do hereby consent and agree to the substitution of Benjamin J. Goodman as the sole attorney for the plaintiffs in my place and in my stead.

Dated: June 7, 1947.

WILLIAM H. LEVIT [67]

I, the undersigned, Benjamin J. Goodman, hereby consent and agree to the foregoing substitution and consent and agree to act as the sole attorney for the plaintiffs.

Dated: June 7, 1947.

BENJAMIN J. GOODMAN

[Endorsed]: Filed Jun. 20, 1947. [68]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that L. Wallace and E. B. Landry, a copartnership doing business as Fullerton Manufacturing Company, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the following:

a) That portion of the final judgment entered in this action on March 25, 1947, which denies plaintiffs a judgment in the sum of \$13,798.50 or in any sum in excess of the sum of \$1936.92, but expressly excluding from said appeal so much of said judgment as awards plaintiffs the sum of \$1936.92.

b) The order denying plaintiffs' motion for new trial and motion to open judgment and take additional testimony entered [69] herein on June 2, 1947, and from each and every other adverse order, ruling and decision of the Court herein.

BENJAMIN J. GOODMAN

Attorney for Plaintiffs and Appellants L. Wallace and
E. B. Landry, a copartnership doing business as
Fullerton Manufacturing Co.

[Endorsed]: Filed & mld. copy to Hindman & Davis,
defts. attys., Aug. 26, 1947. [70]

[Title of District Court and Cause]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto World Fire and Marine Insurance Company of Hartford, Connecticut, a corporation, defendant in the above entitled case, in the penal sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to be paid to said defendant, its successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas, L. Wallace and E. B. Landry, a co-partnership doing business as Fullerton Manufacturing Co., plaintiff, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made and entered on March 25th, 1947, in favor of the plaintiffs by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

Now, Therefore, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate

Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect. [71]

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principals or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 20th day of August, 1947.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By L. D. Jenson

Attorney in Fact

Attest Theresa Fitzgibbons

Agent

The premium charged for this bond is \$10.00 per annum.

State of California,

County of Los Angeles—ss:

On this 20th day of August, 1947, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared L. D. Jenson, known to me to be the Attorney-in-Fact, and Theresa

Fitzgibbons, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

S. M. SMITH

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires Feb. 18, 1950.

Examined and recommended for approval as provided
in Rule 8.

BENJAMIN J. GOODMAN

Attorney

I hereby approve the foregoing.

Dated this 26th day of August, 1947.

EDMUND L. SMITH

Clerk U. S. District Court, Southern District of
California

By Charles A. Seitz

Deputy

[Endorsed]: Filed Aug. 26, 1947. [72]

[Title of District Court and Cause]

APPELLANTS' STATEMENT OF POINTS

Plaintiffs and appellants will rely upon the following points in the prosecution of their appeal from the judgment herein:

I.

The District Court erred in entering its findings of fact on the evidence as follows:

1. In making so much of finding of fact number VI as finds that the report of January 3, 1946 was a report of values under the policy in suit.

2. In making so much of finding of fact number VII as finds that a report of values was due on December 31, 1945, [73] and was delinquent on January 31, 1946.

3. In making finding of fact number VIII.

II.

The District Court further erred as follows:

4. In making conclusion of law number I that plaintiffs are only entitled to judgment against defendant in the sum of \$1,936.92 and in failing to conclude that plaintiffs are entitled to judgment against defendant in the sum of \$13,798.50.

5. The Court erred in not entering judgment for plaintiffs and against defendant in the sum of \$13,798.50.

6. The Court erred in denying plaintiffs' motion for new trial.

7. The Court erred in denying plaintiffs' motion to open the judgment and take additional testimony.

8. The Court erred in failing to find and hold that under the terms of the policy even if a report of values was due on December 31, 1945 and delinquent on January 31, 1946, since such report of values was the first report due under the policy, there was no penalty for delinquent filing, and the applicable limit of liability was that set forth in the last sentence of paragraph 9 (Full Reporting Clause).

9. The Court erred in failing to find and hold that under the terms of the policy the first report of values was not due until January 31, 1946, and not delinquent until 30 days thereafter, and therefore the report of values filed on February 26, 1946 complied with the policy terms.

10. The Court erred in finding and holding that the report of January 3, 1946 was a report under the new policy and limited plaintiffs' recovery to the sum of \$1,936.92.

BENJAMIN J. GOODMAN

Attorney for Plaintiffs and Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 27, 1947. [74]

[Title of District Court and Cause]

ORDER FOR TRANSMISSION OF EXHIBITS

The Court being of the opinion, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, that the original exhibits herein should be inspected by the appellate court;

Now, Therefore, It Is Hereby Ordered that the Clerk of this Court is hereby authorized and directed to transmit to the Clerk of the Circuit Court of Appeals all of the original exhibits introduced in the above entitled cause, in lieu of copies thereof; the same to be transmitted at the same time as the remainder of the transcript of record is transmitted to said Court.

Dated: Aug. 27, 1947.

JACOB WEINBERGER
U. S. District Judge

[Endorsed]: Filed Aug. 27, 1947. [77]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 77, inclusive, contain full, true and correct copies of Complaint on Contract; Summons; Answer; Agreed Statement of Facts; Opinion; Findings of Fact and Conclusions of Law; Judgment; Substitution of Attorneys filed March 28, 1947; Motion for a New Trial and Motion to Open Judgment and Take Additional Testimony Pursuant to Rule 59; Affidavits of Benjamin J. Goodman and George Penney in Support of Motion for New Trial, etc.; Minute Order Entered June 2, 1947; Substitution of Attorneys filed June 20, 1947; Notice of Appeal; Cost Bond on Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Order for Transmission of Exhibits which, together with copy of Reporter's Transcript of January 6 and June 2, 1947 and original Plaintiffs' Exhibits 1 and 2 and original Defendant's Exhibit A, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$19.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 2 day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, January 6, 1947

Appearances:

For the Plaintiffs: George Penney, Esq., 939 Rowan Building, 458 South Spring Street, Los Angeles California.

For the Defendant: Hindman & Davis, By: E. Eugene Davis, Esq., 908 Consolidated Building, 607 South Hill Street, Los Angeles, California.

Los Angeles, California, Monday, January 6, 1947,
11:00 A. M.

The Court: I understand this is to be presented upon a stipulation of facts?

Mr. Penney: That is right, your Honor. We have filed our stipulation of facts. We will present it upon the stipulation of facts.

The contract was in force and effect at the time of the fire, I will ask that it be marked Exhibit A and I will offer it at the present time.

The Court: Any objections?

Mr. Davis: No objections on the policy.

The Clerk: That will be Exhibit 1.

Mr. Penney: Oh, I am sorry, Exhibit 1. Then we have our stipulation on the facts.

(Document handed to the Court.)

This is the policy which was in effect prior to the time of the—

The Court: Prior?

Mr. Penney: Yes, your Honor.

The Court: Are you offering that?

Mr. Penney: Yes, in accordance with the stipulation I have served upon opposing counsel, your Honor. My memorandum of authorities. I have these in duplicate at this time.

The Court: Have you a memorandum of authorities you wish [2*] to file?

Mr. Davis: Yes, your Honor. I didn't want to interrupt counsel. May I interrupt?

The Court: Yes.

Mr. Davis: There are a couple of points that we have not stipulated upon, that I did not feel like asking the plaintiff to stipulate to, and I wanted to put in a little testimony. However, if he is willing to stipulate to it I would like to make a statement of what I intend to prove by this witness:

That the defendant received these statements of value referred to and that they believed in them and acted upon them in issuing them the second policy, and that they used them in determining the underwriting for the second policy.

The Court: That would naturally follow, wouldn't it?

Mr. Penney: Yes, your Honor. I assume that would take place. If they were going to do anything like that I would want to have some stipulation, however, that the minimum premium here would pay for a certain amount of insurance; it would not be limited to the amount previously set forth.

The Court: From reading this I understand there is first an issue of fraud.

*Page number appearing at top of page of original Reporter's Transcript.

Mr. Davis: Yes, your Honor, it is an issue of concealment and misrepresentation.

The Court: And then the second is that the interpretation [3] of the provisional clause of your insurance policy?

Mr. Davis: That is correct.

The Court: Of course I have not read the stipulation of facts, but I presume the facts are stated in there as the amount of insurance and the reports are probably correct.

Mr. Penney: They are correct.

The Court: We are assuming that.

Mr. Penney: There is no question about that at all.

The Court: If there was fraud it might be a question whether the policy was not entirely void, is that correct?

Mr. Penney: That is correct.

The Court: All I can do, gentlemen, is to study these memoranda. But here is a thought that occurred to me: The plaintiff is claiming that they are taking advantage of their 30 day period of grace and made their report of the actual amount on hand. In other words, in this case they have reported either two or three thousand dollars each reporting period and had not made the report at the end of the month preceding the fire; that then after the fire they reported this 27 or 29 thousand dollars—I have forgotten the figures—so it is apparently the contention of the plaintiff that they could carry along and report an amount less than the actual inventory and take advantage of the 30 days, and then by making a report after the 30 day period get the full coverage.

Mr. Penney: No. [4]

The Court: Isn't that the effect of it?

Mr. Penney: No, your Honor. If this had occurred at that time under the old policy I would not raise any

question about it at all. It was my contention and the theory upon which this case was brought that the issuing of a new policy was a new contract of insurance and that it was not a renewal of the old contract of insurance. If this had happened under the old policy I would have advised my clients not to have done that at all. But our whole theory is that these are separate contracts of insurance and they are not continuing contracts at all.

The Court: Assuming that is true, I have been giving this some thought from the pleadings as to the exact picture. However, I think it would be a waste of time for me to attempt to discuss it until I have read the briefs and get your theories.

Mr. Penney: That is right.

Mr. Davis: Now may I state this, your Honor. As a matter of common knowledge and practice—and let Mr. Penney listen to me and if he agrees with me I won't have to call this witness—the practice in writing this type of insurance is when the risk is first presented there is a certificate of values and an estimate made and then the policy is issued and monthly reports are made. A month before the last month of the first policy an estimate of the provisional amount necessary to take [5] care of the risk is made, based upon these reports. Those estimates obviously cannot be made as of the last day of the month because they would not have any data to work on, to write a policy on the first of January, we will say; so they take their data up to the first ten months and then upon that date, based upon the reports submitted by the assured to the company, the insurance company decides upon its underwriting. It decides from that the provisional amount that will be necessary, based on the months, and that they collect their deposit premium. Following on from that the assured may report more or less.

Now in this case, and I think Mr. Penney will agree with me, at the conclusion of this first policy a statement was made to the assured setting up each month's report as the assured reported it. Then an average was made and it was determined from that average in this case that the assured had an average of \$4,000.00 at risk. He had made a deposit premium of some \$140.00—I have forgotten the exact amount. The difference between the deposit premium and the minimum premium of \$100.00 was returned to him by the agent. It was accepted by him. I think he received it after the loss, but before any reports of different values were made to us. The compilation, based upon these averages, produced a premium of less than \$50.00, but because there was a minimum premium provided the assured received back the amount over the minimum that had been [6] made as a deposit premium. Then that data is carried right on into the second policy. Now I can show by Mr. Rankin, who was the underwriter in this case, that this was a renewal policy in the sense the policy was renewed by his office on the data that they already had, and while it was in the form of a new policy it carried into it the information and data used in the old. All of those things I want to show to the Court. However, if Mr. Penney agrees they are correct I won't call the witness.

Mr. Penney: I think that is substantially correct, your Honor.

The Court: As I understand these provisional policies, for instance, if a man goes in and wants such a policy,—the purpose of the policy is to cover fluctuated inventories.

Mr. Davis: That is right.

The Court: He will say, for instance in one case, that his inventory is \$2,000.00, or we will say \$5,000.00; he will then make a deposit of a premium on the basis of \$5,000.00; and then they take the average for the period. Is it ten months? Or is the average for the year taken? That is the way I understand it.

Mr. Davis: The ten months is the data for the renewal.

The Court: For the renewal?

Mr. Davis: But they take their average for the year in final compilation. [7]

The Court: For the 12 months?

Mr. Davis: Yes, your Honor.

The Court: Then they figure out the amount of insurance on a monthly basis. Then if the original deposit is insufficient the policyholder owes additional money.

Mr. Davis: That is right.

The Court: Or if there is an excess there is a refund?

Mr. Penney: That is correct, your Honor. In this particular case here the refund would be for the previous year, that is, any refund which they sent back in 1946.

The Court: That is true.

Mr. Penney: It would be for the calendar year 1945. Then when they figure their premium for 1946 they would take the report made under the new policy.

Mr. Davis: Under the old policy, you mean.

Mr. Penney: No, under the new policy.

The Court: In other words, they would take the experience under the old policy as the requirement for a deposit under the new?

Mr. Penney: That is right, and any refund goes back on the old policy.

The Court: Yes.

Mr. Penney: At the conclusion of the year 1946 they then would have to determine the premium to be paid under the policy which was in existence at the time of the fire. [8]

Mr. Davis: Mr. Penney, I notice you had a statement. May we show that to the Court?

Mr. Penney: Oh, sure.

Mr. Davis: That statement under the old policy, I have one, but it is pasted.

The Court: Has that been introduced in evidence?

Mr. Davis: No, your Honor, but I would like to introduce it. This is the statement rendered to the assured, the final statement, premium adjustment, which was rendered after the first policy had run its term and from which was computed the \$44.00 return premium that the assured got. Is that right?

Mr. Penney: Yes, he got that.

Mr. Davis: May I offer this in evidence as Defendant's Exhibit A?

(The document was marked Defendant's Exhibit A.)

The Court: As I understand, it is your contention, Mr. Penney, that each year represents an independent

contract and has no relation to the old; and it is the contention of the defendant that they are tied in by reason of the experience of the previous year as a basis upon which the deposit is made for the next year.

Mr. Penney: That is correct, your Honor, but that is only for the minimum deposit premium.

The Court: That is correct, the minimum deposit.

Mr. Penney: And I think it is further stipulated— [9]

Mr. Davis: And it also to determine the limit of liability.

Mr. Penney: That is correct. You will also stipulate, will you not, Mr. Davis, that the minimum premium here would have covered approximately twice the average amount which was reported by the plaintiff in that policy which was in existence in 1945?

The Court: I have not read the statement of facts. It is hard for me to understand in reading the pleading an explanation of the reporting of really a nominal amount when the man actually had a stock on hand. In other words, it has the appearance on the face of it that the man was working either to pay a small amount of insurance and then if he had a fire he would jump in and collect a large amount.

Mr. Penney: If that had happened under the original policy, but your Honor we get into a situation here and find it happens quite frequently—this is off the record here—

(Further remarks of counsel omitted from the record.)

The Court: I understand the minimum, but if I remember that would have been an understatement.

Mr. Penney: That is right. There is no question about that.

The Court: If he would have gotten by with that for the year without a loss.

Mr. Penney: That is the chance he takes, that is right. [10]

The Court: I know, but if he had gotten by in the year without a loss he would have paid the minimum amount of insurance. However, where there was 30 days to file his statement, if he had a fire, in the meantime he could have filed a larger amount.

Mr. Penney: No, sir.

The Court: You are claiming 27/29ths of it in round numbers, are you not?

Mr. Penney: That is right.

The Court: And the defendant claims he is entitled to 2/27ths—

Mr. Davis: 2/29ths.

The Court: If the policy is not void under fraud.

Mr. Penney: I think they could raise that question at any time under the old policy. My theory here is just this: That under the new policy there it is the first report he had to make and that where the loss occurred under the new policy they cannot go back to the old policy and tie the old policy in to the new policy. That is our whole case. If the loss had occurred in 1945 he would not have

had any 30 day grace at that time because the policy does not provide that. The provision of the policy is that on the first report, and it is my contention they are separate contracts.

The Court: The policies are worded differently?

Mr. Penney: No, there is no difference, your Honor. [11]

The Court: There is no difference in the wording of the two policies?

Mr. Penney: No, they are both standard form policies.

The Court: Do you gentlemen desire to submit any answers to the points and authority submitted?

Mr. Davis: I think probably we both would, your Honor, because neither one of us have read the other's papers.

The Court: I will allow you 15 days to do that.

Mr. Davis: Do you stipulate to my statement, the one I made before, Mr. Penney?

Mr. Penney: Yes, I think that is correct. I think the Court will take judicial notice of his experience in matters of this kind.

Mr. Davis: I think it should be a matter of proof, but so long as you stipulate we will rest upon our stipulations.

Mr. Penney: That is satisfactory.

The Court: 15 days to file a reply brief.

[Endorsed]: Filed Aug. 27, 1947. [12]

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, June 2, 1947

Appearances:

For the Plaintiff: William H. Levit and Benjamin J. Goodman.

For the Defendant: George Penney.

Los Angeles, California, Monday, June 2, 1947, 10:30 A. M.

The Court: You may proceed.

The Clerk: Case No. 5814-BH-Civil, L. Wallace and others against World Fire and Marine Insurance Company.

Mr. Goodman: The plaintiff is ready, your Honor. If the court please, this is a motion for a new trial.

The Court: I have read your memorandum.

Mr. Goodman: I don't know that there is anything I can add to that unless your Honor cares to have oral argument at this time.

The Court: Not unless counsel desires to argue it. You have asked for a new trial and asked to introduce the notice. I feel if the notice is as you claim, I would have to deny any judgment because I think it admits one of two things. It either admits they failed to comply with the terms of the policy or your client is guilty of fraud.

Mr. Goodman: Well, we are prepared to take the circumstances whatever your Honor's ruling may be. But we do feel this, your Honor, that the case was tried with that report as really the basis of the case on both sides and

I think there must have been an inadvertence on both sides that the report was not presented to your Honor. If we are wrong on the facts or the law after the report is in we are prepared to take the consequences of that, but we feel it [2] should be admitted in evidence, at least to make the record clear.

The Court: This case was tried virtually on a stipulation of facts by competent attorneys and I see no reason why a motion for new trial should be granted.

Mr. Goodman: We do not expect to try the case over.

The Court: I am going to deny the motion for new trial.

Mr. Goodman: We merely want to get the report in the record.

The Court: The motion for a new trial will be denied.

(Whereupon, the above entitled matter was concluded.)

[Endorsed]: Filed Oct. 2, 1947. [3]

[Endorsed]: No. 11747. United States Circuit Court of Appeals for the Ninth Circuit. L. Wallace and E. B. Landry, a copartnership doing business as Fullerton Manufacturing Company, Appellants, vs. World Fire and Marine Insurance Company of Hartford, Connecticut, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 3, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11747

L, WALLACE and E. B. LANDRY, a co-partnership,
doing business as FULLERTON MANUFACTUR-
ING CO.,

Appellants,

vs.

WORLD FIRE AND MARINE INSURANCE COM-
PANY OF HARTFORD, CONNECTICUT, a cor-
poration,

Appellee.

APPELLANTS' STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Now come L .Wallace and E. B. Landry, a co-partner-
ship, doing business as Fullerton Manufacturing Co., ap-
pellants above named, and for their Statement of Points
upon which they intend to rely in this appeal, adopt the
Statement of Points filed by them in the United States
District Court in connection with their Notice of Appeal
and included in the transcript of record prepared and
certified by the Clerk of said District Court.

Appellants designate the entire record herein to be
printed.

BENJAMIN J. GOODMAN

Attorney for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 13, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

MOTION TO DISPENSE WITH PRINTING OF
ORIGINAL EXHIBITS

Appellants hereby move the Court to consider the exhibits herein in their original form and dispense with the necessity of printing said exhibits on the following grounds which appear from the record herein:

1. The District Court made its order, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure that the original exhibits should be transmitted to this Court, and said exhibits are now in the custody of this Court.

2. That said exhibits consist of two identical standard form fire insurance policies which contain many lines of fine print and several endorsements; that only one endorsement is involved in this case and on this appeal; that appellants intend to print said endorsement in their Brief herein so that the same will be readily available to the Court.

3. That the cost of printing the record herein without said exhibits is approximately \$260.00 and if said exhibits are included therein the additional cost by reason of said inclusion will be approximately \$210.00.

4. That in preparing and filing their Designation of Record herein, appellants did not intend to request the printing of the exhibits.

Respectfully submitted,

BENJAMIN J. GOODMAN

Attorney for Appellants

ORDER DISPENSING WITH PRINTING OF
EXHIBITS

Pursuant to the foregoing motion and good cause appearing therefor:

It is hereby ordered that the exhibits in the above cause shall be considered by the Court in their original form and the Clerk shall omit the same from the printed record herein.

Oct. 20, 1947.

WILLIAM DENMAN

Circuit Judge

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 20, 1947. Paul P. O'Brien,
Clerk.



No. 11747

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership doing
business as FULLERTON MANUFACTURING COMPANY,
Appellants,

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY OF
HARTFORD, CONNECTICUT, a corporation,
Appellee.

BRIEF OF APPELLANTS.

FILED

JAN 7 1941

PAUL P. O'BRIEN,
CLERK

BENJAMIN J. GOODMAN,
810 William Fox Building, 608 South Hill
Street, Los Angeles 14,
Attorney for Appellants.

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Specification of Errors.

The District Court erred:

1. In making so much of finding of fact number VII as finds that a report of values was due on December 31, 1945, and was delinquent on January 31, 1946.
2. In making finding of fact number VIII.
3. In making conclusion of law number I that appellants were only entitled to judgment against defendant in the sum of \$1,936.92 and in failing to conclude that appellants were entitled to judgment in the sum of \$13,798.50.
4. In denying appellants' motion for new trial and to open the judgment and take additional testimony.
5. In failing to find that under the terms of the policy even if a report of values was due on December 31, 1945, and delinquent on January 31, 1946, since such report was the first report due under the policy and there was no penalty for delinquent filing, the applicable limit of liability was that set forth in the last portion of paragraph 9 (the coinsurance clause).
6. In failing to find that under the terms of the policy the first report of values was not due until January 31, 1946, and not delinquent until 30 days thereafter, and therefore the report of values filed on February 26, 1946, complied with the policy terms.
7. In finding that the report of January 3, 1946, was a report under the new policy and limited appellants' recovery to the sum of \$1,936.92.

ARGUMENT.

I.

Summary of Argument.

Appellants' contentions may be summarized as follows:

1. Under this provisional reporting form policy with its value reporting clause and honesty clause, once the first monthly report of values is filed, the insured's recovery is thereafter limited by his last report of values, if he underreports his values; and once the first monthly report of values is filed, if the insured is thereafter delinquent in his monthly reports, his recovery is limited to the amount reported in his last report of values. But under the express provisions of the policy, between the inception date of the policy and the filing of the first report of values, the insured's recovery is limited only by the limit of liability and the coinsurance clause; and this is so even though the first report of values is delinquent, because the policy expressly provides that in that event the policy shall still "cover," but only at the locations specified in the policy. To hold, as the district court did, that delinquency in filing the first report voids the policy is to read into it a provision which is directly contrary to the policy provisions, and contrary to applicable rules of construction.

2. Since the policy was written on the 31st day of December 1945 for one year and required the filing of monthly reports of value (with a 30 day grace period) on the "last day of each month of the policy term," the

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No. 11747

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership doing
business as FULLERTON MANUFACTURING COMPANY,
Appellants,

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY OF
HARTFORD, CONNECTICUT, a corporation,
Appellee.

BRIEF OF APPELLANTS.

Jurisdiction.

This action was brought in the District Court by reason of diversity of citizenship (28 U. S. C. A., sec. 41 (1)), the plaintiffs being residents of California and the defendant being a Connecticut corporation and a resident of that state [Tr. 2]. The amount sued for was \$13,798.50, exclusive of interest and costs [Tr. 7].

The case comes within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions at law or in equity, as provided in 28 U. S. C. A., section 225. The judgment was entered in the District Court on March 25, 1947 [Tr. 47]; appellants' motion for a new trial was filed on March 31, 1947 [Tr. 59], and was

denied by order of the District Court on June 2, 1947 [Tr. 68]. Notice of appeal from the judgment was filed on August 26, 1947 [Tr. 69].

Where a motion for new trial is seasonably filed, the time to appeal does not commence to run until disposition of the motion.

Morse v. United States, 270 U. S. 151, 70 L. Ed. 518;

Aspen Mining etc. Co. v. Billings, 150 U. S. 31, 37 L. Ed. 986.

Statement of the Case.

This action was brought by appellants to recover the sum of \$13,798.50 alleged to be due on a "Provisional Reporting Policy" of fire insurance issued by appellee to appellants, and covering appellants' stock of merchandise consisting principally of oil well tools manufactured or in process of manufacture [Exhibit 1,¹ Tr. 2-7]. Judgment was for appellants in the sum of \$1936.92 [Tr. 46].

The policy was issued by appellee to appellants for a term of one year commencing at noon on December 31, 1945 [Exhibit 1]. On February 14, 1946, merchandise insured by the policy and which was then of a value of \$29,625.20 was damaged by fire in the sum of \$27,253.18 [Agreed Statement, par. V, Tr. 27]. Subsequently, appellants filed proof of loss with appellee setting forth that the amount of their loss was \$27,253.18, and that under the terms of the policy there was due the sum of \$13,-

¹The original exhibits have been transmitted to this Court and by order of this Court have been omitted from the printed record [Tr. 91]. For the convenience of the Court and wherever necessary the pertinent portions thereof will be reproduced in this brief.

798.50. The appellee admitted the amount of the loss but denied that it owed appellants anything [Findings, par. VII, Tr. 44].

The case was tried on an agreed statement of facts [Tr. 26-9], and hence there is no dispute as to the facts. The dispute between the parties concerns the interpretation of those provisions of the policy relating to the filing of reports of values by the insured and to the method of determining the amount of the insurer's liability.

The pertinent provisions of the policy are contained in the printed rider attached to the policy entitled "Provisional Reporting Policy Form No. 1 (Monthly Average)." This type of policy is intended for use where an insured has a stock of fluctuating value. The policy does not insure the merchandise covered for a specified amount but provides:

"2. 'PROVISIONAL AMOUNT CLAUSE': The amount of insurance provided for hereunder is provisional and is the amount on which the deposit premium is based, it being the intent of this insurance to insure hereunder the actual cash value of the property described herein subject to the limits of liability and provisions for other insurance hereinafter provided."

It is then provided that:

"3. 'LIMIT OF LIABILITY': This policy being for the provisional amount of \$4,400.00 being 100% of the total contributing insurance, liability of this company is limited to the same percentage of any loss and in no event to exceed the same percentage of each of the following limits * * *

Item Number	Limit of Liability for all Contributing Insurance at	Location Street Number and city
1	\$15,000.00	345 E. Santa Fe, Fullerton, California

* * *

It is clear from the form that the provisional amount of \$4,400.00 is used only to compute the deposit premium and in no way limits or affects the amount of recovery in the event of loss.

Then comes the "Value Reporting Clause" (paragraph 8) which provides for the filing of monthly reports of values by the insured and specifies the penalty for delinquent filing:

"8. 'VALUE REPORTING CLAUSE.'

(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein."

Then comes paragraph 9, the "Full Reporting Clause" (commonly called the "honesty" clause). The effect of this clause is to penalize an insured who underreports his values by limiting his recovery to the proportion his last report of values bears to the actual values. This same clause also contains what is commonly known as a co-

insurance clause; that is to say, the recovery is limited to the proportion that the limit of liability (here \$15,000.00) bears to the actual value of the property. In other words, if the limit of liability is only 50% of the actual value of the property insured, the insured can never recover more than 50% of his loss, and so he, in effect, becomes a co-insurer as to 50% of the risk. This clause reads as follows:

“9. ‘FULL REPORTING CLAUSE.’ Liability under this policy shall not in any case exceed that proportion of any loss hereunder * * * which the last value reported to this company prior to the loss * * * bears to the actual cash value of the property above described * * *. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss.”

Since it is around these two paragraphs (8 and 9) that the dispute revolves, we believe it will be helpful to here summarize their pertinent provisions:

1. A report of values is due on the last day of each month of the policy term, but a 30-day grace period is allowed for the filing thereof (par. 8A).
2. The policy is not voided by delinquency in reporting; on the contrary it is provided that the policy shall still “cover,” but subject to the following restrictions:

(a) The policy shall cover for not more than the amount specified in the last report of values filed prior to the loss; that is to say, the limit of liability specified in the policy is thereby reduced to the amount reported in the last report of values (par. 8B).

(b) If it is the first report of values which is delinquent, the policy covers only at the locations specifically named therein (par. 8B).

3. Liability for a loss is limited by the last report of values filed prior to the loss so that an insured who under-reports is thereby penalized (par. 9—honesty clause).

4. Liability for a loss shall not exceed the proportion of the loss which the limit of liability specified in the policy bears to the actual value of the property (par. 9—coinsurance clause).

Appellants did not file any report of values under the policy in suit prior to the fire,² which occurred February 14, 1946, but on February 26, 1946, appellants reported the value of the property at the time of the fire as \$29,625.20 [Findings, par. VII, Tr. 44]; and subsequently filed proof of loss setting forth the value of the property at the time of the fire as \$29,625.20, damage to the property by the fire in the sum of \$27,253.18; and that the amount due under the policy was the sum of \$13,798.50 [Findings, par. VII, Tr. 44].

Appellants arrived at this amount as follows: Since the policy was effective at noon December 31, 1945, the first report of values was due thereunder on January 31, 1946, and would not be delinquent for 30 days thereafter or

²The district court concluded that the last report of values filed under a prior policy (No. 013121) which expired December 31, 1945, and which report was filed with appellee on January 3, 1946, and reported values as of December 31, 1945, must be considered in determining appellee's liability under the policy in suit (No. 4801476) [Findings, par. VIII, Tr. 44-5]. We shall discuss that finding hereinafter (see Point V, Argument) and show that it is in error. .

until March 2, 1946; therefore, no report was required to be filed prior to the occurrence of the fire on February 14, 1946. An examination of the form discloses that where the loss occurs before the first report of values is filed, the only provisions determining and limiting the amount of recovery are the limit of liability (here \$15,000.00) and the coinsurance clause. The determination of the insurer's liability under the coinsurance clause is a simple mathematical calculation expressed as follows: That proportion of the loss (\$27,253.18) which the limit of liability (\$15,000.00) bears to the value of the property (\$29,625.20), to wit, the sum of \$13,798.50.

But even if it be held, as it was by the District Court, that a report was due on the policy in suit on December 31, 1945, which was the inception date of the policy, the result would be no different. Under that theory, the 30-day grace period would have expired January 30, 1946, and so the report would have been delinquent at the time of the fire. But, as we have shown, the policy provides in detail in paragraph 8B what the penalties shall be for delinquent reporting; and it is there specifically provided that where the first report is delinquent, the policy shall nevertheless "cover" but only at the locations named in the policy. Therefore, the amount of recovery is again arrived at by applying the same formula as before.

The district court rejected the above reasoning. It held that delinquency in filing the first report of values would void the policy; that a report under this policy was due on December 31, 1945, the inception date of the policy, and would have been delinquent on January 31, 1946; but that delinquency (and consequent voidance of the policy) was avoided by the report of values of January 3, 1946, which was the last report of values filed

under the prior policy (No. 013121), but which the court held to also be a report under the policy in suit. It construed that report to be the last report of values under the policy in suit within the meaning of the honesty clause [Findings, par. VIII, Tr. 44-5] and limited appellants' recovery accordingly to the sum of \$1,936.92. It was admitted that this report of January 3, 1946, underreported the value of the merchandise on hand as of December 31, 1945, in that the actual value of merchandise on hand on that date was in the sum of \$28,140.72, whereas the report set forth values in the sum of \$2,000.00.

It was also admitted that under the prior policy³ (No. 013121) appellants consistently underreported the value of the insured property in their monthly reports of value. As appears from the Agreed Statement, paragraphs VIII and IX [Tr. 27-29], and the Findings, paragraph VI [Tr. 43-44], there were twelve reports of value filed under that policy commencing as of January 31, 1945, and ending as of December 31, 1945,⁴ in which appellants reported values ranging from \$8,000.00 to \$2,000.00, when in fact the values ranged from some \$28,000.00 to some \$19,000.00. Appellee contended that these low reports under the prior policy constituted concealment and misrepresentation as to the policy in suit [Answer, Tr. 13-16]. The District Court found against appellee on

³The old policy expired December 31, 1945, at noon and the new policy took effect at that time. The new policy and the old policy were identical in terms except that in the new policy the provisional amount was reduced from \$15,000 to \$4,400.00, the limit of liability from \$30,000.00 to \$15,000.00 and the deposit premium from \$144.00 to \$100.00. [Exhibits 1 and 2.]

⁴The report of January 3, 1946.

this defense on the ground that the understatement of value were immaterial, since the insurer had protected itself by the honesty clause [Findings, par. IX, Tr. 45; Opinion, Tr. 36-39]; and the court further found that the values reported were actually far less than appellants could have reported under the minimum premium provided for by the policy; that is to say appellants could have reported far larger values without incurring liability for increased premium [Findings, par. IX, Tr. 45; Opinion, Tr. 37].

In any event, the findings on the issue of concealment and misrepresentation were against appellee, and since appellee has not appealed from the judgment it would appear that those issues have been finally determined adversely to appellee for the purposes of this lawsuit, and are therefore not before this Court on this appeal.

After the judgment was entered in appellants' favor for the sum of \$1,936.92, they filed a motion for a new trial and to open the judgment for the purpose of taking additional testimony, for the principal purpose of getting into evidence, the actual report of January 3, 1946 [Tr. 48-50]. A true copy of the report was attached to the motion [Tr. 66] and it shows on its face that it was filed under and had reference only to the prior policy (No. 013121) and covered the period from December 1, 1945, to December 31, 1945. The District Court denied the motion.

Appellants have taken this appeal from that portion of the judgment which denies them judgment in the sum of \$13,798.50 or in any sum in excess of \$1,936.92, and from the order denying their motion for new trial and to open the judgment and take additional testimony [Tr. 69].

Specification of Errors.

The District Court erred:

1. In making so much of finding of fact number VII as finds that a report of values was due on December 31, 1945, and was delinquent on January 31, 1946.

2. In making finding of fact number VIII.

3. In making conclusion of law number I that appellants were only entitled to judgment against defendant in the sum of \$1,936.92 and in failing to conclude that appellants were entitled to judgment in the sum of \$13,798.50.

4. In denying appellants' motion for new trial and to open the judgment and take additional testimony.

5. In failing to find that under the terms of the policy even if a report of values was due on December 31, 1945, and delinquent on January 31, 1946, since such report was the first report due under the policy and there was no penalty for delinquent filing, the applicable limit of liability was that set forth in the last portion of paragraph 9 (the coinsurance clause).

6. In failing to find that under the terms of the policy the first report of values was not due until January 31, 1946, and not delinquent until 30 days thereafter, and therefore the report of values filed on February 26, 1946, complied with the policy terms.

7. In finding that the report of January 3, 1946, was a report under the new policy and limited appellants' recovery to the sum of \$1,936.92.

ARGUMENT.

I.

Summary of Argument.

Appellants' contentions may be summarized as follows:

1. Under this provisional reporting form policy with its value reporting clause and honesty clause, once the first monthly report of values is filed, the insured's recovery is thereafter limited by his last report of values, if he underreports his values; and once the first monthly report of values is filed, if the insured is thereafter delinquent in his monthly reports, his recovery is limited to the amount reported in his last report of values. But under the express provisions of the policy, between the inception date of the policy and the filing of the first report of values, the insured's recovery is limited only by the limit of liability and the coinsurance clause; and this is so even though the first report of values is delinquent, because the policy expressly provides that in that event the policy shall still "cover," but only at the locations specified in the policy. To hold, as the district court did, that delinquency in filing the first report voids the policy is to read into it a provision which is directly contrary to the policy provisions, and contrary to applicable rules of construction.

2. Since the policy was written on the 31st day of December 1945 for one year and required the filing of monthly reports of value (with a 30 day grace period) on the "last day of each month of the policy term," the

first report was not due until January 31, 1946, or delinquent until March 2, 1946, and hence no report was delinquent at the time of the fire on February 14, 1946. The district court's conclusion that the first report was due December 31, 1945, the inception date of the policy, was therefore in error.

3. The policy in suit took effect upon the expiration of a prior policy in the same company. The last report of values under the old policy was filed January 3, 1946. Since each policy is a separate and distinct contract, the references in the value reporting and honesty clauses of the new policy to reports must be deemed to be to reports under that policy and not to reports filed under the old policy; and the last report filed under the old policy may not be used to limit the insured's recovery for a loss occurring under the new policy. The report of January 3, 1946 was a report under the old policy and the district court's conclusion that it was also a report under the new policy and limited appellants' recovery was in error.

4. Since the case was tried on an Agreed Statement, and since the district court misconstrued the reference therein to the report of January 3rd and construed it to be a report under both the old and new policies; and since this erroneous construction formed the basis of its decision, it was an abuse of discretion to deny appellants' motion for new trial and to reopen the judgment so that the report itself could be introduced in evidence where the report showed on its face it was made only under the old policy.

II.

The Applicable Rule of Construction.

Since the problem here involved revolves around the proper interpretation of the policy provisions, we here set forth the rules of construction applicable in California to insurance policies. These rules are so well settled that no extended citation of authority is necessary.

The general rule is succinctly stated in the recent case of *Culley v. New York Life Ins. Co.*, 27 Cal. (2d) 187, 163 P. (2d) 698:

“* * * Any doubt as to the meaning of the policy must be resolved in favor of the insured under well known rules of interpretation.”

And as was held in the case of *Fagcol Truck & Coach Co. v. Pacific Indemnity Co., et al.*, 18 Cal. (2d) 731, 117 P. (2d) 661, where open to more than one interpretation, a policy should be so construed as to give the greatest protection to the insured:

“But if there be any ambiguity in the Detroit policy, it must be resolved against the insurer (*cit.*). If to give the quoted clause the meaning contended for would release Detroit from liability, then it must be construed so as to permit recovery since it is ‘susceptible of such construction.’ Where two interpretations equally fair may be made, that which affords the greatest measure of protection to assured will prevail.”

And where there is a conflict between two provisions in a policy:

“the general rule should apply that where the language of the policy is susceptible of two constructions

that which is most beneficial to the insured should be adopted.”

Frenzer v. Mutual Benefit, etc. Ass’n., 27 Cal. App. (2d) 406, 81 P. (2d) 197.

The reason for the rule is stated in *Siskin v. Alliance Ins. Co.*, 200 Cal. 70, 251 Pac. 922:

“* * * It is a well settled rule of interpretation that the terms of said clause in said policies are to be construed liberally in favor of the insured and strictly against the insurer, and this by reason of the fact that whatever ambiguity or uncertainty exists therein has been caused by the insurer.”

III.

Delinquency in Filing the First Report Does Not Void the Policy; and Until the First Report Is Filed the Only Limit of Liability Is the Coin-surance Clause.

It is appellants’ contention that the provisions of the policy are clear and unambiguous, and that by attributing to each part of this carefully drafted form its plain meaning, there is not the slightest difficulty in solving the problem here presented.

Appellants’ position may be stated as follows: From and after the time that *the first report of values is filed* by the insured with the insurer, the insurer has fully protected itself by reason of any subsequent delinquency in filing of reports. But, for reasons best known to it, the insurer has failed to provide any penalty (other than that the policy shall cover only at the locations specified) for *delinquency in filing the first report*. Likewise, for reasons best known to the insurer, the honesty clause is

so worded that it does not operate during the period from the inception date of the policy to the filing of the first report of values. It is only after the first report of values has been filed that the honesty clause comes into play, and thereafter during the life of the policy, the insured is limited in his recovery by the values set forth in his last report of values, and if he has underreported those values, his recovery is correspondingly reduced. In this way, the insurer has protected itself from underreporting by the insured. At the same time, the insurer has provided (paragraph 14) that it may at any time during the term of the policy or within one year after its expiration, audit the insured's records and examine the insured property to determine the true values at risk during the policy term, and thus determine and collect the premium actually due, even though the insured may have underreported his values. In other words, and as found by the District Court, underreporting of values is a matter of complete indifference to the insurer as it cannot be harmed thereby.

Under the plain language used in the policy, it is submitted that until the first report of values is filed, the only provisions limiting the amount of recovery are (1) the limit of liability (here \$15,000.00) and (2) the co-insurance clause contained in paragraph 9.

Here then we have a situation where the form has been meticulously drawn in order to fully protect the insurer against understatements and delinquencies in reporting *from the time the first report of values is filed*. Had the insurer desired the same protection during the initial period from the inception of the policy to the filing of the first report, it could have easily provided that a report of values must be filed at the time the policy is written, and

have limited recovery to those values during that initial period. For reasons best known to it, the insurer did not see fit to so provide. Instead, it specifically provided that where the first report is delinquent the policy shall nevertheless "cover" at the locations named in the policy.

If we omit from consideration for the moment, the report of January 3, 1946 which was filed under the old policy but which the district court construed to also be a report under the policy in suit, and if it be assumed that no report was due until January 31, 1946 or delinquent until 30 days thereafter, then it is clear that the fact that no report had been filed at the time of the loss would not prejudice the insured's right of recovery. Indeed, the district court so held in its opinion:

"* * * it has been held in cases dealing with similar policies that where the loss occurs before a required inventory is taken, but within the grace period, or where no grace period is provided, within a reasonable time, an inventory or report made after the loss is sufficient upon which to base recovery (*cits.*)" [Tr. 34].

We do not find any provision in the form requiring, as indicated by the District Court, that in such a situation, a report must be filed *after* the loss in order to entitle the insured to recover. It is submitted that the rights of the parties should be deemed fixed as of the time of the fire, and all the insured need do after the loss is to file his proofs of loss, and the amount of his recovery will be limited only by the limit of liability and the coinsurance clause. However, appellants did file a report of values after the loss on February 26, 1946, so if it be concluded that such a report was required, appellants have complied.

We now come to the question of whether delinquency in filing the first report of values results in voiding the policy. The district court held that the first report of values was due on December 31, 1945 and so was delinquent at the time of the fire unless the report of January 3, 1946 be regarded as a report under the policy in suit. While we disagree with this conclusion and will hereinafter point out the reasons why we believe it is erroneous, for the purposes of the present discussion it will be assumed that the first report was delinquent at the time of the fire. The district court concluded that if the first report was delinquent at the time of the fire, the policy was thereby voided and the insurer was under no liability whatsoever:

“If plaintiffs’ contention that the January 3rd report was not made under the new policy is accepted, they are in complete default, since the thirty day grace period expired on January 30, 1946. Where there has been no evaluation at all, and a definite period is set within which to state the value; a failure by the insured to comply with the requirement is sufficient ground for the insurer to avoid all liability (*cits.*)” [Tr. 35].

In order to determine the answer to this question, we submit that the policy form must be looked at by itself without regard to the prior policy or any reports submitted under it; for this is a pure question of policy interpretation and the answer arrived at in this case should apply equally in any case where the first report is delinquent, even though no prior policy is involved.⁵

⁵The effect of the January 3rd report and the prior policy will be discussed hereinafter.

Taking the form by its four corners, it is submitted that it is entirely clear and unambiguous, and is not open to the construction that delinquency in *filing the first report* subjects the insured to any penalty other than is specifically stated therein. The policy specifically provides in detail what the penalties for delinquent reporting shall be. To add the further and drastic penalty of avoidance in the face of specific language in the policy that it shall continue to "cover" does violence to all rules of construction applicable to insurance policies. To so hold requires the ignoring of the clearly expressed provisions of the policy, the creation of an ambiguity where none exists, and the construction of that ambiguity in favor of the insurer.

In support of its construction of the policy, the District Court cites four cases. An examination of these cases readily discloses that none of them are authority for the District Court's holding. Two of the cases, *Royal Ins. Co. v. Kline Bros.*, 198 Fed. 468, and *Istrouma Mercantile Co. v. Northern Assurance Co.*, 165 So. 11, dealt with entirely different types of policies and reports, and in each case the policy contained a specific provision voiding it for failure to keep or file the required reports. In view of such a provision, these cases can be of no help in interpreting the policy in suit.

The other two cases cited by the District Court are *Atlantic Fruit Co. v. Hamilton Fire Ins. Co.* (N. Y.), 167 N. E. 184, and *Rivaz v. Gerussi Bros.*, 6 Q. B. D.

222. These cases are cited in support of the District Court's statement that—

“It is material that the declaration of values be within the period of grace, for if the insured could wait until the risk was past, and then understate the value of the property which had been subject to the risk, he would get the benefit of full coverage with an unjustly low premium.”

The *Atlantic Fruit Co.* case dealt with an entirely different form of provisional reporting policy which did not contain a “Value Reporting Clause” (paragraph 8) or an honesty clause (paragraph 9) or any analogous clauses. Nor did the case deal at all with the question of delinquency in filing the first report of values. The question involved was as to the effect of repeatedly underreporting values (under a single policy), and the court held that the policy was thereby voided. But clearly that holding is entirely inapplicable to the policy in suit in view of its “Value Reporting” and honesty clauses. Indeed, the District Court in the case at bar squarely held that in view of those clauses the policy would not be avoided by understatements of value. It is submitted that the holding in the *Atlantic Fruit Co.* case has no bearing whatsoever on the question of whether the policy in suit is voided by delinquency in filing the first report of values.

The *Rivas* case likewise is not in point. It involved several open marine policies and the effect of concealment of material facts at the time the policies were taken out. Indeed, at a later point in its Opinion [Tr. 38-9], the District Court points out that the case is of no assistance,

As to the District Court's statement that to permit the insured to recover where his report is delinquent would enable him "to wait until the risk was past, and then understate the value of the property which had been subject to the risk," thereby enabling the insured to "get the benefit of full coverage with an unjustly low premium," there are several answers:

(a) We are here concerned only with delinquency in filing the first report, and since the form was so drafted by the insurer to permit recovery where the first report was delinquent, subject only to the limitations specified in the form, it is neither just nor proper nor the function of a court, to refuse to enforce the policy as written in order to relieve the insurer from a supposed "unjust situation" which it itself created by drafting the form as it did.

(b) The situation imagined by the court could only occur under this policy with its value reporting and honesty clauses where it is the first report that is delinquent. But the insurer may always avail itself of its opinion to cancel the policy if the insured fails to file the report within the time specified, and if the insurer continues on the risk when the report is delinquent, it should not be heard to complain of the delinquency, especially where, as here, the policy specifies no penalty. Indeed, the case of *Schenley Distillers Corp. v. U. S. Fire Ins. Co.*, 90 F. (2d) 633 (cited in the Opinion herein) infers that there is a duty upon the insurer to protest to the insured if the latter is dilatory in his reports.

(c) Since we are here concerned only with delinquency in the first report, the situation imagined by

the court could not occur; that is to say, the risk could not pass and thus enable the insured to "get the benefit of full coverage with an unjustly low premium." It is inconceivable that an insurer would permit the policy to run the entire policy period without requiring a report to be filed or, in the alternative cancelling the coverage. If it does so, it would have only its own inattention to its business to blame for its predicament. And, with its right of audit it can always ascertain and collect the full premium to which it is entitled.

(d) Since delinquency in filing any report other than the first report does not void the policy, what rule of construction justifies placing a different interpretation where it is the first report that is delinquent, where there is no language in the policy so providing?

Summarizing the foregoing, it is submitted that the only reasonable construction of the policy in suit is that if a loss occurs *before the first report of values is filed*, regardless of whether the first report is delinquent, the insured is entitled to recover the amount of his loss, limited only by the limit of liability and the coinsurance clause; that even if the policy were also open to the construction adopted by the District Court, namely, that delinquency in reporting voids the policy, it is nevertheless also open to the construction urged by appellants, and under well settled rules applicable to insurance policies, the construction most favorable to the insured must be adopted.

IV.

**No Report Was Due on the Policy in Suit Until
After the Fire.**

The District Court concluded that a report of values was due under the policy in suit on December 31, 1945, which was the inception date of the policy:

“A report of values was due on the last day of each month of the policy term, so a report of values was due under the new policy, as well as on the old policy on December 31, 1945. If it be argued that no report could be expected since the policy covered only one day in the month of December, this departure from the express words of the contract would put us in the difficult position where we must determine how and where to draw the line. Would a report be due if the effective date were December 30, or December 20, or December 16? Must the policy have been effective a week, or half a month, or the whole month? The words of the policy are clear and unambiguous in this regard—under the new policy a report was due on December 31, 1945.”

It has already been pointed out (Point III), that it is immaterial whether the first report of values was or was not delinquent at the time of the loss; in either event, the measure of recovery would be the same. Nevertheless, since the District Court directly held that a report was due on December 31, 1945, and since it seems clear that it was this holding that led the District Court to further conclude that the report of January 3, 1946, was a report under the new policy, we deem it important to show wherein the District Court erred in concluding that a report was due under the policy in suit on December 31, 1945.

Although the policy in suit took effect upon the expiration of a similar (though not identical) prior policy, it was, as stated by the District Court, "a separate and distinct contract," and it seems clear that the requirements as to filing reports under the new policy must be determined by an examination of the provisions of that policy without regard to the fact that it succeeded a prior policy; in other words, no different number of reports would be required under the new policy if it had been the first policy written by the appellee for the appellants. However, we do believe it is proper to look at the reporting practices under the prior policy in order to see what interpretation the parties themselves put upon similar reporting provisions of a policy which also took effect on December 31, but of a prior year.

Here we have a policy which is effective at noon on December 31, 1945, for a period of one year. The policy says that the insured shall file a report with the company "on the last day of each month of the policy term." It is submitted that giving this language its ordinary meaning, and using a common sense approach, one would conclude that the policy term encompassed twelve months; that this in turn means that there would be twelve reports to file, the first one at the end of the first month, to wit, January 31, 1946, and the last one at the end of the last month, to wit, December 31, 1946. We do not believe anything is to be gained by asking, as the District Court did, what the situation would be if the policy were written on December 20 or December 16. Apparently the court concluded that no matter when the policy was written, thirteen monthly reports were required. We express no opinion as to that, preferring to confine ourselves to the precise question here involved, viz., when the first

report is required to be filed under a policy written on the last day of a month. It is submitted that to hold that a report is required on the very day the policy is written where the policy speaks of "the last day of each month of the policy term" does violence to the plain meaning of the language used and to well settled rules of construction.

Section 10 of the California Civil Code provides that time shall be computed as follows:

"The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it is also excluded."

That this section is to be used in construing an insurance policy appears from the case of *Law v. Northern Assurance Co.*, 165 Cal. 394, 132 Pac. 590:

"'Insurance hereunder to cease 30 days from this 19th day of March, 1906 at noon' could only mean that excluding the first and including the last day, the term of the contract would expire on April 18th at noon (Civ. Code, Sec. 10; Code Civ. Proc., Sec. 12)."

And a similar result was reached in the case of *Homestead Fire Ins. Co. v. Ison* (Va.), 65 S. E. 463, where the policy provided it was to be void unless an inventory was made within 30 days of its issuance. The policy was issued February 8, 1907, and the fire occurred at 11 P. M., March 10, 1907. The court held that the time for preparing the inventory had not expired at the time of the fire:

"When an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day designated and to include the last day of the specified period. * * *

Assuming that the 30-day period in the case at bar began to run from the date of the policy, and excluding that day, * * * the time had not expired by one hour at 11 o'clock, Sunday night, March 10th."

See also:

Messner v. Superior Court, 101 Cal. App. 172, 281 Pac. 503.

No good reason appears why the foregoing rule should not be applied here, and therefore excluding the first day (December 31st), the last day of the first month of the policy term would be January 31st, on which day the first report would be due; and the 30-day grace period would expire on March 2nd, which was after the fire (February 14) and after the date on which appellants filed their first report (February 26).

Furthermore, the construction put by the parties on identical reporting provisions of the prior policy, which was also written on the last day of the month (December 31, 1944), shows that they construed it to require only twelve reports, commencing January 31, 1945, and ending December 31, 1945. This appears from the Agreed Statement, paragraph IX [Tr. 27-29], from the findings, paragraph VI [Tr. 43], and from Defendant's Exhibit A, which is the Premium Adjustment Statement rendered to appellants by appellee under the old policy upon the termination of that policy [Tr. 83]. The original Exhibit A is before this court and it shows *twelve* reports of values submitted under that policy commencing with January and ending with December and covering the period *commencing December 31, 1944*, and ending December 31, 1945.

We believe a complete answer to the contention that thirteen reports are required under this form is found from an examination of Exhibit A itself. For the convenience of the court a photostat copy of a copy of Exhibit A is reproduced in the appendix hereto. It is a printed standard form used by the insurance companies. It will be noted that, as to each location, the form makes provision for the insertion of only twelve values. If thirteen reports were contemplated, there would certainly have been thirteen spaces provided. Apparently, the insurance companies regard their form as requiring only twelve reports. Such construction by the drafters of the form, including appellee, should satisfy this Court of its correctness.

V.

The Report of January 3, 1946, Was Not a Report Under the Policy in Suit.

The District Court concluded that a report was due on the policy in suit December 31, 1945; also that if the first report was delinquent at the time of the fire, the policy was void. We believe that we have shown (Points III and IV, *supra*) that these conclusions were in error.

Having so concluded, the District Court went on to hold that the report of January 3, 1946 which was admittedly a report under the old policy, was also a report under the new policy and hence determined the amount of appellants recovery:

“Plaintiffs’ report of January 3rd was within the terms of paragraph 8 (A), and since they made no other report during January, the conclusion is inescapable that the single report covered both the old and the new policies. They stated that the property

was worth * * * \$2,000 on December 31, 1945. If it was worth \$2,000 under the old policy on that day, it was worth no more under the new one. They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied on to compute the company's liability. The mere circumstance that the report they made was also within the terms of the old policy, which was a separate and distinct contract, does not alter the fact that it was within the terms of the new policy. To hold otherwise would enable the plaintiffs to profit by their own wrong, and would void the policy as hereinafter discussed."

Careful analysis of the foregoing holding discloses that a most unusual and we believe erroneous result has been reached. The District Court's conclusion means simply this: that under the first provisional reporting form policy taken out by an insured with a given company, there is no penalty for delinquency in filing the first report of values, and if the loss occurs before the first report is filed, the insured's recovery is limited only by the limit of liability and the coinsurance clause (see Point III, *supra*).⁶ But, where the policy is the second (or third, etc.) policy in the same company, then the last report of values filed under the old policy must be deemed to also be the first report under the new policy, and thus come within the honesty clause of the new policy, which limits recovery to "the last value reported to this company prior to the loss."

⁶We realize that the district court did not so conclude. However, we believe we have shown that a proper construction of the policy requires such a conclusion.

It is submitted that the mere statement of the proposition demonstrates that it is untenable. The words used could not have one meaning when the form is attached to an initial policy and another when it is attached to a second or renewal policy.

Here, as was stated by the District Court, we have two entirely "separate and distinct contract(s)." They make no reference to each other and certainly there is no language in the new policy which directly states or even remotely infers that the various references to reports of value in any way refer to reports filed under prior policies. It is submitted that the only reasonable construction of the policy is that, in every instance, the reference to reports is to reports required to be filed under that particular policy. To hold otherwise would be to completely ignore settled rules of construction applicable to insurance policies. In the absence of clear language in the policy expressly stating that reports under prior policies are to be included, it is submitted that they may not be considered in any way in determining the liability of the insurer under a new policy.⁷

Whether we call the policy in suit a renewal policy or an entirely new and separate contract the result is the same. In either case, it is a "separate and distinct contract."

⁷In its Opinion [Tr. 39] the district court stated that "a material misrepresentation under a prior connected policy is sufficient to void the policy sued on." But it found the misrepresentations here to be immaterial and so dismissed the point. In any event, the question of what is or is not a misrepresentation has no bearing on the point here under discussion which is solely one of policy construction.

“A renewal of a policy of fire insurance is, in effect, a new contract of insurance, and unless otherwise expressed, on the same terms and conditions as the original policy * * *”

Shock v. Penn. etc. Ins. Ass’n., (Pa. Super. Ct.),
24 A. (2d) 741.

“But this is not a renewal of the anterior insurance. It is an independent contract of insurance. If a simple renewal of older insurance had been effected, an action would necessarily have to be brought upon the former policy.”

Arlington Co. v. Empire City Fire Ins. Co., 101
N. Y. S. 772.

Actually, in the case at bar, the new policy differed in two important respects from the old policy; the provisional amount was reduced from \$15,000.00 to \$4,400.00 and the limit of liability from \$30,000.00 to \$15,000.00 [Agreed Statement, pars. III and VIII, Tr. 26-27, 77-78; Opinion, Tr. 30-31]. In view of these changes, we do not believe it proper to refer to it as a renewal policy.

An examination of the Agreed Statement, the short transcript of the trial, the Opinion and the Findings make clear that the report of January 3rd⁸ was in fact a report only under the old policy, and that the finding of the District Court that it was also a report under the new

⁸A copy of the report was attached to the motion for new trial [Tr. 66] and will be referred to under Point VI, *infra*.

policy resulted from its erroneous construction of the policy.⁹

In support of that statement we refer the Court to the following:

(a) Paragraphs VIII and IX of the Agreed Statement [Tr. 27-29], refer to the old policy and then state:

IX.

“That commencing on or about the 31st day of January, 1945, plaintiffs reported to defendant, in writing, what purported to be the actual cash value of the property described *in said policy* * * * as follows: * * *

Then follow the twelve reports of value filed under the old policy commencing with the report of January 31, 1945 and *ending with the report of January 3, 1946.*

(b) The following statements of court and counsel at the very short trial when the case was submitted on the Agreed Statement:

“The Court: * * * In other words, in this case they have reported either two or three thousand dollars each reporting period and had not made the report at the end of the month preceding the fire; that then after the fire they reported this 27 or 29 thousand dollars * * * [Tr. 79]. * * *

⁹It has been held that the rule that findings shall not be set aside by an appellate court unless clearly erroneous, has no application where the case is submitted on an agreed statement of facts,

U. S. v. Kern River Co. (C. C. A. 9), 264 Fed. 412, or where the evidence is all documentary,

U. S. v. Mitchell (C. C. A. 8), 104 F. (2d) 343.

To the same effect see:

Equitable Life Assur. Soc. v. Irelan (C. C. A. 9), 123 F. (2d) 462.

The Court: *As I understand, it is your contention, Mr. Penney, that each year represents an independent contract and has no relation to the old; and it is the contention of the defendant that they are tied in by reason of the experience of the previous year as a basis upon which the deposit is made for the next year.*

Mr. Penney [Plaintiffs' counsel]: That is correct, your honor, but that is only for the minimum deposit premium.

The Court: That is correct, the minimum deposit.

Mr. Penney: And I think it is further stipulated—

Mr. Davis [defendant's counsel]: and it is also to determine the limit of liability.¹⁰ [Tr. 83-4] * * *

Mr. Penney: I think they could raise that question at any time under the old policy. My theory here is just this: *That under the new policy there it is the first report he had to make and that where the loss occurred under the new policy they cannot go back to the old policy and tie the old policy in to the new policy.* That is our whole case. If the loss had occurred in 1945 he would not have had any 30 day grace at that time because the policy does not provide that. The provision of the policy is that on the first report, and it is my contention they are separate contracts” [Tr. 85-6].

(c) The Final Premium Adjustment statement under the old policy [Exhibit A] also lists the twelve reports filed under that policy starting with January 1945 and concluding with December 1945 (the January 3rd report).

¹⁰In this case, it resulted in a reduction in the limit of liability from \$30,000.00 in the old policy to \$15,000.00 in the new policy.

(d) The District Court's Opinion which definitely finds the report of January 3, 1946 to be a report under the old policy, but construes it to also be a report under the new policy, apparently as a result of the Court's conclusion that a report was due under the new policy on December 31, 1945.

(e) Paragraph VI of the findings [Tr. 43-4] which states:

"That under said policy of insurance [the old policy] the plaintiffs reported to the defendant at the end of each month the values on hand for the preceding month."

Then follows reference to the twelve reports filed under the old policy ending with the report of January 3rd.

And paragraph VIII of the findings [Tr. 44-5] where the Court states:

"The Court finds that under the terms and conditions of the policy in effect at the time of the fire the report made on January 3, 1946 determines the liability of the defendant to the plaintiff * * *."

It is submitted that the foregoing indicates quite clearly that the Court and counsel understood the report of January 3rd to be, and in fact it was, the last report of values filed under the old policy, and that it was not intended as nor was it a report under the new policy; that it was only the Court's construction of the policy, in particular its conclusion that a report was due under the new policy on December 31, 1945, that led the court to "construe" the January 3rd report to also be a report under the new policy.

Under the circumstances, it is submitted that the district court's finding that the report of January 3rd was a report under the new policy was erroneous.

VI.

**The Motion for New Trial and to Open the Judgment
Should Have Been Granted.**

Appellants maintain (Point V, *supra*) that the evidence presented to the District Court permits only one conclusion, viz., that the report of January 3rd was a report under the old policy and was not a report under the new policy. However, if this Court should conclude that it is unable to state that the District Court was in error on the evidence presented to it, in concluding that the report of January 3rd was a report under both policies, then appellants maintain that it was error for the District Court to deny appellants' motion for new trial and to open the judgment to take additional testimony, so that the report of January 3rd could be introduced in evidence, thus replacing conjecture as to its scope with certainty.

Appellants are fully cognizant of the rule that ordinarily the action of the District Court in granting or denying a new trial under Rule 59 is a matter of discretion and will not be reviewed on appeal. However, like most matters within the discretion of a trial court, where the court has abused its discretion, such abuse is subject to correction on appeal.

"It is assigned as error that the trial court abused its discretion in denying the motion for a new trial. Ordinarily the ruling of the trial court on motion for a new trial is not subject to review the motion being addressed to the sound discretion of the trial court. There is, however, an exception to this rule in cases where the trial court has, as the law terms it, abused its discretion."

United Press Ass'n v. Nat'l Newspaper Assn. (C. A. 8), 254 Fed. 284.

“Under certain circumstances the appellate court may inquire into the action of the trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion (cits.); or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced (cits.).”

Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 77 L. Ed. 439.

To the same effect, see also:

Oras, et al. v. U. S. (C. C. A. 9), 67 F. (2d) 463;

Yeates v. U. S. (C. C. A. 5), 254 Fed. 60;

Glenwood Irr. Co. v. Vallery (C. C. A. 8), 248 Fed. 483.

The chief purpose of appellants' motion was to reopen the case so that the report of January 3rd could be introduced in evidence. It is appellants' contention that under the circumstances here existing it was a manifest abuse of discretion for the District Court to refuse to reopen the case to permit the introduction of this report in evidence.

As appears from the affidavits filed in support of the motion, the actual report was not offered in evidence at the trial, because of the inadvertence of appellants' then counsel.¹¹ On March 18, 1946, after the court's opinion

¹¹The affidavit of appellants' former counsel states as follows in this regard:

“That through inadvertence of your affiant, your affiant neglected to have a true copy of said report of values dated January 3, 1946, attached to the Agreed Statement of facts herein as an exhibit or to offer the same in evidence on behalf of plaintiffs at the trial of this case.” [Tr. 67].

was rendered, the omission was discovered and called to said counsel's attention by appellants' present counsel, with a request that he immediately move to reopen the case. Before so doing, appellants' former counsel attempted to obtain a stipulation from defendant's counsel allowing the report in evidence. This failed, and at about the same time (March 25) the findings were signed and the judgment entered. The motion was filed by appellants' present counsel on March 31 [Tr. 60-67].

It cannot be denied that this report goes to the very essence of the case, both of appellants and appellee. Certainly, both appellants and appellee and their respective counsel knew what the report stated, and when they referred to the report in the Agreed Statement it was that report in its actual form that they were referring to. And when the Agreed Statement was submitted to the Court at the trial, it seems clear from the remarks of counsel that it was assumed that everyone understood that the report was a report under the old policy. And as appears from the findings and Opinion, it is this report that formed the very basis of the District Court's disposition of the case. As stated in the Opinion "* * * the conclusion is inescapable that the single report covered both the old and the new policies." Having so construed the report, the District Court concluded that recovery was limited by the values specified in said report.

There is not the slightest doubt that had the District Court had the opportunity to examine the report before reaching its decision it would have concluded that it was a

report only under the old policy. This appears from the following comment made by the District Court when it denied the motion for new trial:

“* * * You have asked for a new trial and asked to introduce the notice. I feel *if the notice is as you claim*, I would have to deny any judgment because I think it admits one of two things. It either admits they failed to comply with the terms of the policy or your client is guilty of fraud” [Tr. 87].¹²

A copy of the report is attached as an exhibit to appellants’ motion [Tr. 66], and an examination of it establishes beyond doubt that it was a report only under the old policy. It is on a printed form furnished by appellee and states in part:

“STATEMENT OF VALUES AND SPECIFIC INSURANCE.

For the period beginning December 1st, 1945, and ending December 31st, 1945, *under terms of Policy No. 013121 * * **.”

It is submitted that under these circumstances it was an abuse of discretion for the District Court to refuse to reopen the case and permit the report to be received in evidence, so that the case could be decided on the true facts instead of a misconception of the facts inadvertently as-

¹²Appellants’ counsel replied to this as follows:

“Well, we are prepared to take the circumstances whatever Your Honor’s ruling may be. But we do feel this, Your Honor, that the case was tried with that report as really the basis of the case on both sides and I think there must have been an inadvertence on both sides that the report was not presented to Your Honor. If we are wrong on the facts or the law after the report is in we are prepared to take the consequences of that, but we feel it should be admitted in evidence, at least to make the record clear.” [Tr. 87-8].

sumed by that Court. Here is a case tried on an Agreed Statement and the entire decision hinged on the report of January 3rd which was referred to in the Agreed Statement, but due to inadvertence of counsel it was not introduced in evidence. The Court, not having seen the report, misconstrued its scope, or assumed it was in a form different than it actually was; and then proceeded to decide the case on the basis of this erroneous assumption. While inadvertence of counsel is not to be commended, under the circumstances here present, it was excusable, and justice required that the case be reopened and the report received in evidence. Certainly to have reopened the case for this purpose would have entailed neither considerable delay nor expense to appellee.

In this connection, the following language from the case of *Bowles, etc. v. Six States Coal Corp.*, 64 F. Supp. 651, which involved an application to reopen a case and take additional evidence, is appropriate:

“The proceeding was filed on December 29, 1944 and counsel for the plaintiff has certainly had ample opportunity to properly prepare said case for trial, and there is no justification or reason existing for the oversight which was allowed to occur by counsel for the plaintiff. However, a lawsuit is not a battle or contest of wits; it is a fair struggle for a just decision, and although considerable inconvenience and expense has been caused the defendants due to the inadvertence on the part of the counsel for the plaintiff, the court does not see how any injury can be done to the defendants or any substantial injustice arise by permitting the introduction of the testimony desired by the plaintiff * * *.”

And in the case of *Gossman v. Gossman*, 52 Cal. App. (2d) 184, 126 P. (2d) 178, the test of what constitutes abuse of discretion is stated as follows:

“‘The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in manner to subserve and not to impede or defeat the ends of substantial justice.’ * * *

In his work, ‘The Nature of the Judicial Process,’ Justice Cardozo wrote (p. 141): ‘The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.” Wide enough in all conscience is the field of discretion that remains.’

Certainly, a decision rendered in disregard of fundamental facts upon which the parties were relying or based on facts not adduced at the trial, and unregulated by those principles which are recognized as being inherent in the true concept of judicial discretion would not be a judicial decision in the true sense.”

A case presenting a situation somewhat similar to that here involved is *Paine, et al. v. St. Paul Union Stockyards Co.* (C. C. A. 8), 35 F. (2d) 624. There judgment was rendered for the plaintiff and defendants moved to reopen

the case for the purpose of introducing further testimony. In denying the motion the District Court stated that:

“If a new trial should be had and this evidence admitted * * *, it would doubtless result in a substantial modification of the decision which has been made in the case.”¹³

The court then proceeded to deny the motion on the grounds that it had no power to grant it, and for that reason refused to consider the newly offered evidence in passing on the motion. On appeal, it was held to be tantamount to a manifest abuse of discretion for the trial court to conclude that it had no power to grant the motion and to refuse to consider the newly offered evidence in passing on the motion, and the case was remanded to the District Court with directions to consider the motion on its merits, and to exercise its discretion in passing on it.

It remains to consider the District Court's statement [Tr. 87] that

“I feel if the notice is as you claim, I would have to deny any judgment because I think it admits one of two things. It either admits they failed to comply with the terms of the policy or your client is guilty of fraud.”

We have already fully discussed (Points III and IV, *supra*), the contention that a report was due on December 31, 1945 under the new policy, and that delinquency in filing the first report of values voids the policy, and we believe we have shown that neither of such propositions is tenable.

¹³Compare with the very similar language used by the district court in the case at bar in ruling on appellants' motion.

What of the alternative assertion by the District Court that, if the January 3rd report was only under the old policy, appellants were guilty of fraud? At the outset, it should be noted that the use of the word "fraud" was no doubt an inadvertence since there was no issue of fraud before the Court. Appellees' answer raised an issue of concealment and misrepresentation [Tr. 13-16], and appellees' counsel stated at the trial that the issue was one of concealment and misrepresentation rather than fraud [Tr. 79]. As was pointed out in *Telford v. New York Life Ins. Co.*, 9 Cal. (2d) 103, 69 P. (2d) 835, a concealment or misrepresentation may be entirely innocent, so there is a definite difference between a charge of fraud and one of concealment or misrepresentation.

It is difficult to understand by what reasoning the District Court concluded that if the January 3rd report was a report only under the old policy then (but not otherwise) appellants were guilty of concealment. In its Opinion the court considered at length the defense of concealment and misrepresentation and concluded that since the understatements of value did not harm appellee but in fact benefited it, they were not material to the risk and hence constituted no defense.¹⁴

And as pointed out by the court, section 334 of the California Insurance Code provides that—

"Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communica-

¹⁴Sections 332 and 359 of the California Insurance Code, respectively, require a concealment and misrepresentation to be material in order to void a policy.

tion is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.”

Since the District Court in effect held that the underreporting, if known to the insurer, would not have “influenced it in forming its estimate of the disadvantages of the proposed contract or in making its inquiries,” how can it be said that to hold that the January 3rd report was a report only under the old policy thereby makes the underreporting material. The only way that result could be reached would be by holding that since the insurer’s liability for this loss was thereby increased from \$1,936.92 to \$13,798.50 the underreporting became material. But to so hold would run directly contrary to section 334 of the Insurance Code by making materiality dependent on the event, when that section specifically provides that “materiality is to be determined *not* by the event.” It is submitted that if the underreporting was immaterial if the January 3rd report was a report under both policies, it was equally immaterial if it was a report only under the old policy.

Can it be reasonably argued that if appellants’ construction of the policy is correct and during the period between the inception of the policy and the filing of the first report of values, the insured may collect his loss limited only by the limit of liability and the coinsurance clause, then underreporting under a prior policy becomes material?

We think not for several reasons:

(a) The District Court’s analysis of materiality is equally applicable here. The policy was drafted by the

insurer and to construe it in accordance with its plain meaning should not change the test of materiality.

(b) Admittedly underreporting is immaterial from the second through the twelfth month of the policy term. It would be a strained and peculiar construction to hold it to be material only during the first month and up to the time the first report is filed, especially where the underreporting was under a prior policy.

(c) The clear language of the policy with its "value reporting" and honesty clauses shows that the insurer has given itself all the protection it wanted, and that it considers underreporting to be immaterial.

(d) For the purposes of this case, the finding of the District Court that there was no concealment or misrepresentation is final, and to now give the report of January 3rd its proper effect and to properly construe the policy, cannot result in reopening that finding.

VII.

The Judgment Should Be Modified.

It is appellants' contention that the judgment should be modified by this court by increasing the amount thereof to \$13,798.50, and that it is neither necessary nor proper to send the case back for a complete retrial. The findings of the District Court were in favor of appellant on the issues of concealment and misrepresentation. Appellee for reasons best known to it failed to move for a new trial or to appeal from those findings and the judgment entered pursuant thereto. Appellants have not appealed from that portion of the judgment, and it would therefore seem to follow that those issues may not be again litigated in this case whatever disposition is made of the case by this

court. Appellants contend that the District Court's interpretation of the policy was erroneous. If this court sustains that contention, since all other issues have been finally determined in appellants' favor, it would appear to be proper for this court to order the judgment modified, as above suggested.

It is not appellants' desire nor intent to ask for or to obtain a judgment in this case for more than it is entitled. Actually, a judgment for \$13,798.50 will not constitute a profit to appellants as their actual loss was approximately twice that amount. Nor will such a judgment be unfair to appellee. It has the right under each policy to receive the full amount of the premium to which it is entitled; and as was held by the District Court, had appellee known of the underreporting, it would still have written the new policy. That a retrial of the concealment issue is not open to appellee is entirely the result of its own choice in failing to appeal from the judgment which determined those issues against it. And that the policy provides as it does and entitles appellants to the said sum gives rise to no ground of complaint by appellee, since it drafted the policy.

It is respectfully submitted that the judgment should be modified by increasing the amount thereof to \$13,798.50.

Respectfully submitted,

BENJAMIN J. GOODMAN,

Attorney for Appellants.

APPENDIX.

FINAL

FILE NO.

PREMIUM ADJUSTMENT STATEMENT

COMPANY THE WORLD FIRE & MARINE INS. CO.POLICY NUMBER 013121

January 31 19 46

INSURED FULLERTON MANUFACTURING CO.STATEMENT OF VALUES FOR PERIOD FROM 12/31 19 44 TO 12/31 19 45

MONTH	LOCATION	LOCATION	LOCATION	LOCATION	LOCATION
	343 E. Santa Fe Avenue				
	P, 65-1 L, 21				
N.	5,000.00				
B.	6,000.00				
AR.	7,000.00				
PR.	8,000.00				
AY	4,000.00				
INE	4,000.00				
LY	4,000.00				
UG.	2,000.00				
PT.	2,000.00				
CT.	2,000.00				
DV.	2,000.00				
CC.	2,000.00				
TOTAL	48,000.00				
AVERAGE	4,000.00				
ATE	.85 .110				
REM.	34.00 4.40				

MONTH	LOCATION	LOCATION	LOCATION	LOCATION	LOCATION
N.					
B.					
AR.					
PR.					
AY					
INE					
LY					
UG.					
PT.					
CT.					
DV.					
CC.					
TOTAL					
AVERAGE					
ATE					
REM.					

RENEWAL DATA

PROVISIONAL AMOUNT FOR RENEWAL _____

PROVISIONAL PREMIUM FOR RENEWAL _____

FINAL PREMIUM ADJUSTMENT

DEPOSIT PREMIUM \$144.00

Minimum

EARNED PREMIUM 100.00

ADDITIONAL OR

RETURN PREMIUM 44.00 R/P

THE FOREGOING IS HEREBY CERTIFIED TO BE A TRUE STATEMENT OF THE VALUES SUBMITTED OVER THE SIGNATURE OF INSURED AND RECEIVED IN ACCORDANCE WITH RULES FOR WRITING PROVISIONAL REPORTING FORM POLICIES

WORLD FIRE & MARINE INS. CO.

COMPANY

CHECKED BY _____

By L. Christy

DATE _____

No. 11747.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership doing
business as FULLERTON MANUFACTURING COMPANY,
Appellants,

vs.

WORLD FIRE & MARINE INSURANCE COMPANY OF HART-
FORD, CONNECTICUT, a corporation,
Appellee.

BRIEF OF APPELLEE.

W. W. HINDMAN,
E. EUGENE DAVIS,
908 Consolidated Building, Los Angeles 14,
Attorneys for Appellee.

FILED
JAN - 7 1907
PAUL R. SUTHERLAND

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L. WALLACE and E. B. LANDRY, a copartnership doing
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Appellants,

vs.

WORLD FIRE & MARINE INSURANCE COMPANY OF HART-
FORD, CONNECTICUT, a corporation,
Appellee.

BRIEF OF APPELLEE.

Appellee's Statement of the Case.

Since this case was tried entirely on written and oral stipulations of fact and written exhibits introduced thereunder, appellee believes that a convenient way of presenting the entire facts to the Court is to set them up exactly as they were stipulated and found by the trial court.

The parties stipulated in writing as follows:

"AGREED STATEMENT OF FACTS. [Tr. 26-27-28.]

"The respective parties, through their attorneys stipulate subject to proper objection as to relevancy and materiality, to the following facts:

1. "That L. Wallace and E. B. Landry are now and were at all times a copartnership doing business under the name of Fullerton Manufacturing Co., with its place of business at 345 East Santa Fe Avenue, Fullerton, California.

2. "That the defendant World Fire and Marine Insurance Company was and now is a corporation organized under and by virtue of the laws of the State of Connecticut and authorized to write fire insurance in the State of California.

3. "That on or about the 31st day of December, 1945, the defendant executed and delivered to plaintiffs its California Standard Form Fire Insurance Policy No. 4801476. The original of said policy is hereto attached, marked 'Exhibit A,' and offered in evidence by plaintiffs."

(This policy was in a provisional amount of \$4,400.00 with a limit of liability of \$15,000.00, and insured from December 31, 1945, at noon, to December 31, 1946, at noon.)

4. "That on or about the 14th day of February, 1946, a fire occurred at the premises described in said policy as 345 East Santa Fe Street, Fullerton, California.

5. "That the actual cash value of the property described in said policy at said location on said 14th day of February, 1946, was in the sum of \$29,625.20, and the actual loss and damage to said property at said location by said fire was in the sum of \$27,253.18.

6. "That the plaintiffs had reported to defendant, in writing, on January 3, 1946, that the actual cash value of the property described at said location on December 31, 1945, was in the sum of \$2000.00, whereas, in fact, the said property at said location at said time was of the value of \$28,140.72.

7. "That plaintiffs made no further statements or declarations of value to defendant until on or about the 26th day of February, 1946, when plaintiffs

orally reported to defendant that the actual cash value of said property at the time of the fire was \$29,625.20, and on the 29th day of March, 1946, in writing, reported the actual cash value of said property to have been, as of January 31, 1946, \$29,000.00, and as of February 13, 1946, \$29,000.00.

8. "That prior to December 31, 1945, defendant's policy No. 013121 was in full force and effect. Said policy is offered as Defendant's 'Exhibit 1.' "

(This policy insured from December 31, 1944, at noon, to December 31, 1945, at noon, and was identical with Policy No. 4801476, sued on herein, except that the provisional amount was \$20,000.00, amended to \$15,000.00, and the limit of liability was \$30,000.00.)

9. "That commencing on or about the 31st day of January, 1945, plaintiffs reported to defendant, in writing, what purported to be the actual cash value of the property described in said policy as located at 345 East Santa Fe Street, Fullerton, California, as follows:

"That plaintiffs, on and as of the 31st day of January, 1945, reported to defendant that the actual cash value at said location to be \$5,000.00, when in truth and fact, said actual cash value at said location was in the sum of \$19,856.00; that plaintiffs, on and as of the 28th day of February, 1945, reported to defendant that the actual cash value at said location to be \$6,000.00 when in truth and fact, said actual cash value at said location was in the sum of \$21,535.00; that plaintiffs, on and as of the 31st day of March, 1945, reported to defendant that the actual cash value at said location to be \$7,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$23,214.00; that plaintiffs, on and

as of the 30th day of April, 1945, reported to defendant that the actual cash value at said location to be \$8,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$24,820.00; that plaintiffs, on and as of the 31st day of May, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$25,331.00; that plaintiffs, on and as of the 30th day of June, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$25,842.00; that plaintiffs, on and as of the 31st day of July, 1945, reported to defendant that the actual cash value at said location to be \$4,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$26,353.00; that plaintiffs, on and as of the 31st day of August, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$26,864.00; that plaintiffs, on and as of the 30th day of September, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact the actual cash value at said location was in the sum of \$27,375.00; that plaintiffs, on and as of the 31st day of October, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$27,886.00; that plaintiffs, on and as of the 30th day of November, 1945, reported to defendant that the actual cash value at said location to be \$2,000.00 when in truth and fact, the actual cash value at said location was in the sum of \$28,338.33; that plaintiffs reported to defendant on the 3d day of January, 1946, that the

actual cash value of such property was, as of December 31, 1945, the sum of \$2,000.00, when in truth and in fact, such actual cash value was, as of December 31, 1945, in the sum of \$28,140.72.' ”

The material portions of the policy sued upon herein are as follows:

The policy insured from the 31st day of December, 1945, at noon to the 31st day of December, 1946, at noon, and contained the following provisions:

“3. ‘LIMIT OF LIABILITY.’ This policy being for the provisional amount of \$4400.00, being 100% of the total contributing insurance, liability of this company is limited to the same percentage of any loss and in no event to exceed the same percentage of each of the following limits, but no insurance attaches under any one or more of the following limits unless a definite amount is specified as a limit and inserted in the blank immediately opposite the location item:

“Item Number	Limit of Liability for all Contributing Insurance	Location Street Number and City
1.	\$15,000.	345 E. Santa Fe, Fullerton, California

* * * * *

“8. ‘VALUE REPORTING CLAUSE.’

“(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the

last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

“(B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.”

“9. ‘FULL REPORTING CLAUSE.’ Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any) which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above described, less the amount of specific insurance, if any, actually in force at that location at the time of such report.”

* * * * *

“However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss.” [Pltf. Ex. 1.]

In addition to the written stipulation, the following oral stipulations were made at the trial, quoting in the exact language of the stipulation:

“That the defendant received these statements of value referred to and that they believed in them and acted upon them in issuing the second policy, and that they used them in determining the underwriting for the second policy.”

“Mr. Davis: Now may I state this, Your Honor. As a matter of common knowledge and practice—and let Mr. Penney listen to me and if he agrees with me I won't have to call this witness—the practice in writing this type of insurance is when the risk is first presented there is a certificate of values and an estimate made and then the policy is issued and monthly reports are made. A month before the last month of the first policy an estimate of the provisional amount necessary to take care of the risk is made, based upon these reports. Those estimates obviously cannot be made as of the last day of the month because they would not have any data to work on, to write a policy on the first of January, we will say; so they take their data up to the first ten months and then upon that data, based upon the reports submitted by the assured to the company, the insurance company decides upon its underwriting. It decides from that the provisional amount that will be necessary, based on the months, and that they collect their deposit premium. Following on from that the assured may report more or less.

“Now in this case, and I think Mr. Penney will agree with me, at the conclusion of this first policy a statement was made to the assured setting up each month's report as the assured reported it. Then an average was made and it was determined from that average in this case that the assured had an

average of \$4,000.00 at risk. He had made a deposit premium of some \$140.00—I have forgotten the exact amount. The difference between the deposit premium and the minimum premium of \$100.00 was returned to him by the agent. It was accepted by him. I think he received it after the loss, but before any reports of different values were made to us. The compilation, based upon these averages, produced a premium of less than \$50.00, but because there was a minimum premium provided the assured received back the amount over the minimum that had been made as a deposit premium. Then that data is carried right on into the second policy. Now I can show by Mr. Rankin, who was the underwriter in this case, that this was a renewal policy in the sense the policy was renewed by his office on the data that they already had, and while it was in the form of a new policy it carried into it the information and data used in the old. All of those things I want to show the Court. However, if Mr. Penney agrees they are correct I won't call the witness.

Mr. Penney: I think that is substantially correct, your Honor.

Mr. Davis: Do you stipulate to my statement, the one I made before, Mr. Penney?

Mr. Penney: Yes, I think that is correct. I think the Court will take judicial notice of his experience in matters of this kind.

Mr. Davis: I think it should be a matter of proof, but so long as you stipulate we will rest upon our stipulations." [Tr. 86.]

Appellee's Argument.

This is a suit upon a provisional reporting fire insurance policy. Appellee insured appellants against loss by fire to the property involved herein from the 31st day of December, 1945, at noon, to the 31st day of December, 1946, at noon, in the provisional amount of \$440.00, and provided for the monthly reporting by the assured of the actual cash value of all of the property described as insured under the policy, as follows:

“(A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.”

The policy also provided under the provisional amount clause that the insurance provided was provisional, it being the intent to insure the actual cash value of the property subject to the limits of liability and provisions for other insurance provided.

There were several limits of liability provided for in the policy.

Under Paragraph 9 entitled “Full Reporting Clause,” which has also been referred to as the “honesty clause,” it was provided as follows (eliminating provisions immaterial to this case):

“Liability under this policy shall not in any case exceed that proportion of any loss hereunder * * *

which the last value reported to this company prior to the loss, * * * bears to the actual cash value of the property above described, * * *”

The policy also contained in Paragraph 9 the further limitation:

“However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss.”

The policy also provided in Paragraph 3 of the form the limit of liability for all contributing insurance of \$15,000.00, and also contained the standard policy provisions for apportionment of insurance between insurers, which is not material here. [Pltf. Ex. 1.]

The policy was effective as of noon on December 31, 1945, and on January 3, 1946, the appellants reported in writing to appellee that the actual cash value of the property described at said location was, on December 31, 1945, in the sum of \$2,000.00, whereas, in truth and in fact, the said property at said location at said time was of the value of \$28,140.72. [Tr. 27.]

The appellants made no further statements or declarations of value to appellee until on or about the 26th day of February, 1946, when appellants orally reported to appellee that the actual cash value of said property on February 14, 1946 was in the sum of \$29,625.20, and, in writing, on the 29th day of March, 1946, reported to appellee that the actual cash value of said property as of January 31, 1946, was \$29,000.00, and was, as of February 13, 1946, \$29,000.00. [Tr. 27.]

In the meantime, the property described was, on the 14th day of February, 1946, damaged by fire in the sum of \$27,253.18. [Tr. 26-27.]

With the language of the policy clear and unambiguous, as appellants concede (App. Br. pp. 11, 14, 18), and the record and stipulations positive as to the facts, it would seem that no further argument than a statement of these facts need be necessary to demonstrate that the District Court gave judgment to appellants for the maximum amount which appellants under any theory were entitled to. While appellee has not appealed from the judgment disallowing its defense that appellants were entitled to nothing, which defense will hereinafter be discussed, it is obvious that the District Court gave appellants the benefit of the doubt and applied the limitations of the honesty clause rather than the more stringent law called for by appellee's defense of fraudulent misrepresentation and concealment, which would have required a judgment for appellee, and appellants, therefore, have no grounds for complaint or to have the judgment appealed from reversed.

Since it is conceded that the policy is unambiguous, the application of the terms thereof is as simple as common fractions.

The policy specifically provided as a sanction for honesty in making reports that in the event of loss the liability under the policy should not in any case exceed that proportion of any loss which the last value reported to this company *prior to the loss* bears to the actual cash value of the property described.

The last value reported to the company, appellee, *prior to the loss* was the report of January 3, 1946, which was

made in writing by appellants to appellee and in which appellants certified that the actual cash value of the property at the location in question was \$2,000.00, whereas, in truth and in fact, the actual cash value at said time and place, to-wit, December 31, 1945, was \$28,140.72.

Therefore, applying the unambiguous policy provisions to the deliberately written Stipulation of Facts on this point, it is manifest that appellants are not *in any case* entitled to more than that proportion of the loss of \$27,253.18 as represented by the following formulae:

$$\frac{2000}{28,140.72} \times 27,253.18 \text{ equals } \$1,936.92$$

Appellants' only contention against this obvious and simple result is that the admittedly false report of January 3, 1946, should be considered as applying only to the previous policy expiring December 31, 1945, at noon, renewed by the policy in suit at its expiration. The answer to this false premise is that the facts do not bear it out, and the deliberate written stipulation of the parties is to the contrary. [Tr. 27, par. VI.]

If any other answer is necessary, we believe that it can be no better expressed than as expressed by the trial court in its opinion, as follows:

"Plaintiffs' report of January 3rd was within the terms of paragraph 8(A), and since they made no other report during January, the conclusion is inescapable that the single report covered both the old and the new policies. They stated that the property was worth Two Thousand Dollars (\$2,000.00) on December 31, 1945. If it was worth Two Thousand Dollars (\$2,000.00) under the old policy on that day,

it was worth no more under the new one. They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied on to compute the company's liability.

“The mere circumstances that the report they made was also within the terms of the old policy, which was a separate and distinct contract, does not alter the fact that it was within the terms of the new policy. To hold otherwise would enable the plaintiffs to profit by their own wrong, and would void the policy as hereinafter discussed.”

Moreover, it is clearly demonstrable that if appellants, under the terms and conditions of the policy and the facts stipulated, are not limited to the amount found by the court, they are entitled to recover nothing. Appellee presented a defense going to the entire recovery; that is, a defense of fraud based upon concealment and misrepresentation which should have avoided the policy and defeated appellants' entire cause of action. [Tr. 13-16; f. 13-17.]

While the court denied appellee this defense, it is obvious from the record that although the court found that appellee was not harmed by the concealment and misrepresentations [Tr. 45, f. 37] that the real basis of the court's denial to appellee of this defense was on the grounds that the full reporting, or honesty clause, above discussed superseded the sanctions provided by law for misrepresentation and concealment so far as a misrepresentation or concealment of the actual cash value of the property involved was concerned. This is clear both from the Court's opinion and from the Court's remarks on the motion for new trial. [Tr. 35, f. 28; Tr. 87, f. 12.] At the motion for a new trial, the Court, denying appellants'

motion to introduce further testimony in the form of a statement of values of January 3, 1946, said:

“I feel if the notice is as you claim, I would have to deny any judgment because I think it admits one of two things. It either admits that they failed to comply with the terms of the policy or your client is guilty of fraud.”

Appellee's defense on the question going to the entire cause of action was based upon the following facts:

Prior to the execution and delivery of the policy in suit herein, appellee had executed and delivered another policy effective the 31st day of December, 1944, at noon, to the 31st day of December, 1945, at noon, which was identical in terms, except for the amounts, with the policy in suit, and required the reports of values required in the policy in suit.

Consistently, and throughout the entire term of this policy, although the policy required a report of the actual cash value of the property described in the policy, appellants had made false reports. [Tr. 27, f. 21, to Tr. 29, f. 23; Tr. 43, f. 35 to Tr. 44, f. 36.]

Every month during the term of this policy the appellants, although obligated to report the actual cash value of the property at the time of the report, reported as the true values, values ranging all the way from $\frac{1}{3}$ approximately to $\frac{1}{13}$ of the actual cash value, and, without going into detail of the many reports, the average of the reports for the period of the policy was \$4,000.00 although the true values averaged \$25,463.00. [Tr. 27, f. 1 to Tr. 29, f. 23.] Appellee, believing appellants' reports and acting upon them, computed the premium and,

finding from the report that the deposit premium was greater than the premium actually earned according to the reports, returned to appellants the difference. [Tr. 81, f. 5.]

Appellee believed these reports and acted upon them and issued the second policy and used these reports in determining the underwriting for the second policy and in fixing the basis of the deposit premium. [Tr. 78, f. 2 and Tr. 79, f. 4 to Tr. 81, f. 6.]

These representations were false, deliberately made, and with the knowledge of the appellants and are presumed fraudulent. They relate to matters material to the risk. Indeed, it was so stipulated [Tr. 78, f. 2; Tr. 80-81, ff. 4-6], and appellants knew that they were material because it was so provided in the policy. [Appellee's Ex. A, Par. VIII.]

The effect of concealment and false representation upon a contract of insurance has been thoroughly settled both by statutory and common law.

The applicable statutory law of California is found in the Insurance Code in the following sections:

"330. Neglect to communicate that which a party knows, and ought to communicate, is concealment.

"331. Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.

"332. Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining.

“334. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

“338. An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.

“350. A representation may be oral or written.

“351. A representation may be made at the time of, or before, issuance of the policy.

“356. The completion of the contract of insurance is the time to which a representation must be presumed to refer.

“358. A representation is false when the facts fail to correspond with its assertions or stipulations.

“359. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false.

“360. The materiality of a representation is determined by the same rule as the materiality of a concealment.

“361. The provisions of this chapter apply as well to a modification of a contract of insurance as to its original formation.”

In *Gates v. General Casualty Co. of America*, 120 F. (2d) 925 (9th Cir.), the Court, speaking of these code provisions, said:

“In so interpreting these code provisions we held them to embody the principle stated by Mr. Justice

Stone in *Stipcich v. Metropolitan Life Insurance Co.*, 277 U. S. 311, 316-318, 48 S. Ct. 512, 513, 72 L. Ed. 895, 'Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, or which he is aware, makes the contract voidable at the insurer's option. (Cases cited.) * * *.'

"(4) With regard to the court's finding that the concealment was 'fraudulently' made, we regard it as surplusage, for under the California law * * * 'a concealment of fact whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intent to deceive is not essential.' *Telford v. New York Life Ins. Co.*, 9 Cal. (2d) 103, 105, 69 P. (2d) 835, 837."

The rules epitomized in the various code sections of the California Insurance Code (Sections 330 to 362, California Insurance Code), are merely restatement of the common law.

"The English rule is that an applicant is bound to disclose a fact material to the risk even though no specific inquiry is made on that subject and the weight of authority in this country favors the English rule. (*Bacon on Life and Accident Ins.*, 4th Ed., Sec. 270, p. 500.) The statutes of this state commit our courts to the rule approved by the weight of authority. * * * Respondent Commission attempts to point out a distinction between a concealment of a material fact and a misrepresentation as to such fact. The legal effect in each instance amounts to the same thing, fraud."

General Acc. Corp. v. Indus. Acc. Com., 196 Cal. 179,

The Court in the above-quoted case then refers to the Code provisions above referred to. (For the Court's convenience, we would point out that the above-cited insurance code provisions were formerly a part of the Civil Code, but were carried bodily into the insurance code without amendments, so that the cases having the Civil Code from Section 2527 on to 2577 are referring to the same code provisions as are above quoted from the Insurance Code.)

It might be noted that the rule originated in marine insurance but has been carried into all forms of insurance, and our Insurance Code applies the rules to all classes of insurance.

As said by *Richards*, one of the most accurate American texts:

“Long ago, in a leading case, Lord Mansfield with sure prescience, announced the general doctrine for all time to come in these words: ‘The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement.’ *Carter v. Boehm*, 3 Burr. 1905, 1909.)”

In *Rivaz v. Gerussi Brothers, et al.*, hereinafter cited at more length, the Court quoted from *Phillips on Insurance*, as follows:

“The true proposition is that stated in *Phillips on Insurance*, s. 531, that “concealment in insurance is where, in reference to a negotiation therefor, one party suppresses, or neglects to communicate to the other, a material fact, which, if communicated, would tend directly to prevent the other from entering into the contract, or to induce him to demand terms more favourable to himself, and which is known or presumed to be known to the party not disclosing it, and is not known, or presumed to be so, to the other.’ ”

In the case of *Queen Ins. Co. of America v. Cummins*, 267 S. W. 144, the Court said:

“When a man takes insurance he is asking some one else to take a risk he is unwilling to carry himself, and common honesty requires that he give to the insurer all the information he has regarding the risk. In *Southern California Insurance Co. v. Lucas*, 15 Ky. Law Rep. 574, it was said:

‘An applicant for fire insurance, whether inquiry was made of him or not, was bound to communicate all facts known to him and by him believed to be material, and his failure to do so must be regarded as a concealment; and it is to be presumed that he knew and believed what men of ordinary intelligence know and believe.’ ”

As specified by the code and shown throughout all of the cases a concealment or misrepresentation of a material matter voids the policy and entitles the insurer to rescind.

Were the facts concealed and misrepresented material facts? The Insurance Code (Sec. 334) states the rule. It would seem that a quotation of this rule should be sufficient:

“Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries:”

It would seem to go without saying that the actual cash value of the property intended to be insured would be one of the important things the underwriters would wish to know in forming the estimate of the advantages or disadvantages of the proposed contract in determining whether to make further inquiries thereof.

As the Supreme Court said in the case of *The Columbia Insurance Company v. Lawrence*, 10 Peters 507, at page 516, 9 L. Ed. 512 at 516:

“Whenever the nature of this interest would have, or might have a real influence upon the underwriter, either not to underwrite at all, or not to underwrite except at a higher premium, it must be deemed material to the risk; and if so, the misrepresentation or concealment of it will avoid the policy.”

It was stipulated that the defendants received the statements of values and that they believed these statements of values and renewed the second policy.

It would seem that nothing more need be said to show the materiality of the representations. The parties had made these reports material. The plaintiffs knew that they were material. They expressly warranted in their

previous policy the actual cash value—not any amount they chose to report, but the actual cash value. They contracted with the insurance carrier on the basis of making such reports.

The real question is, would the defendant, had it known that in the face of the plaintiff's solemn agreement and warranty to make reports of the actual cash value they had consistently, for almost a year, reported false values, have entered into the contract with them? Would the knowledge that plaintiffs had made false reports consistently throughout the previous year have influenced the defendant in determining whether or not to make further inquiries? I think we can ask ourselves the question. Would we enter into a contract of the highest faith with ones who had so conducted themselves? The knowledge that false reports had been made consistently would certainly have introduced a question of moral hazards and would have had a probable and reasonable influence upon the defendant. The courts recognize the moral hazard as the physical hazard.

Davenport v. Firemen's Ins. Co., 199 N. W. 203;

Patrons Mut. Fire Ins. Co. v. Pagenkoff, 182 N. W. 18;

Westchester Fire Ins. Co. v. Fitzpatrick, 2 F. (2d) 654.

Certainly, had the defendant known the actual cash value of the property, it would, under the terms of the policy, have demanded and received a larger deposit premium. But that is not all. As the Stipulation shows, it is information necessary for it to calculate its re-insurance and probably to determine the amount of net line that it cares to carry.

As said by Judge Cardozo in *Atlantic Fruit Co. v. Hamilton Fire Ins. Co.*, 167 N. E. 184, at page 185:

“An insurer issuing such a policy has an interest in knowing the value and location of the property at risk to enable it to calculate the premium due from the insured and to some extent for other purposes as, for example, re-insurance.”

The question of the amount of value, whether high or low, is obviously always one of the material considerations in determining whether or not to take the risk or in determining the terms upon which the risk can be taken. It is a matter of common knowledge that the premium is much less under the form of policy providing for co-insurance than where the insurance is written without such a limitation. The question is not one of whether the risk was increased by the concealment, but whether or not the insurer was presented a different risk than the true one. A good illustration of this is furnished in an early case where the assured had concealed the imperfect condition of the hull of a boat, and his policy, though against fire only, which was not affected by this condition, was held void.

Lexington Ins. Co. v. Paver, 16 Ohio 324.

It is ridiculous to contend that an insurer would not be influenced in accepting a risk by its knowledge, or lack of knowledge, of the actual cash value of the property.

The only case that we have been able to find which seems to present the exact situation as here, and in which the same contention was made by the plaintiffs, that is, that although they had misrepresented the facts in the

prior policy that these facts should not be related to the new policy, is the case of *Rivaz v. Gerussi Brothers, et al.*, 6 Q. B. D. 222, and is also found in reprint Law Journal 1881, New Series, Vol. 50, Common Law, a case from the Court of Appeals Queen's Bench. There were opinions by all three of the justices participating, but as the opinion of Cotton, L. J., is so concise and covers the ground so thoroughly, we are quoting it in full:

“I am of the same opinion. It was not disputed—indeed it was found at the trial—that there had been previous policies on goods to be shipped by the defendants, and that before the 1st of October they had declared, on those previous policies, goods to the value of 19,000/ at about 11,000/. The jury by their second findings say that those declarations were made falsely and fraudulently by the defendants, and that the declarations were material to the subscription of the policy, and that the plaintiffs were induced thereby to subscribe the policy. I understand that finding to involve that the underwriters at the time they subscribed the two last policies knew the amount declared on the previous ones; and there is then a further finding that the defendants concealed and abstained from disclosing the amounts which had been at risk on the previous policies. That finding is not disputed. The question is, can the two later policies be upheld under the circumstances? It is said that no concealment would vitiate a policy unless it was a concealment of facts directly concerning the risk. I think that is not the correct rule. It is not the rule which was adopted by the House of Lords

in *Sibbald v. Hill* (1) or in *Ionides v. Pender* (2) when Lord Blackburn disputed the rule laid down by Duer, and agreed with that stated by Parsons. Here it is found that the underwriters were induced to underwrite the policies by the statement of the declarations made under the previous policies, and also that it was a fact material to be known to them what was the amount remaining on the previous policies. In my opinion, the facts concealed here come within the correct rule as to concealment of material facts, and I see no reason to question the findings of the jury, or to say there was nothing upon which the jury could properly find that the underwriters were induced to grant the two later policies upon the faith of the declarations made by the defendants upon the two prior ones. Judgment affirmed."

The law is unquestioned that the appellants, by their consistent, willful, and continuous misrepresentation of the actual cash value of the property have barred themselves from recovery, unless we concede that the honesty clause in this policy supersedes for this purpose the penalties provided by the statute and common law, and that, as the trial court said, appellant's contention regarding the report of January 3, 1946, either admits that appellants failed to comply with the terms of the policy or that they were guilty of fraud, and the trial court either rendered judgment for the appellants for more than they were entitled to or for the maximum they were entitled to, and they cannot complain on this appeal.

Answer to Appellants' Argument.

Appellants group their argument under several subheads. The first is:

THE APPLICABLE RULE OF CONSTRUCTION.

Little need be said about this subhead, as the rule set forth is well recognized. However, it is equally well recognized that "the rule of construction under discussion does not require the court to give the policy a strained or unnatural construction. The policy, like any other contract, must be interpreted according to the intention of the parties as expressed in the instrument." (*Baine v. Continental Ins. Co.*, 21 Cal. (2d) 1.) Moreover, appellants contend and insist that the policy is not ambiguous, and with this we agree. (App. Br. pp. 11, 14, 18.)

Appellants' next subhead is:

DELINQUENCY IN FILING THE FIRST REPORT DOES NOT VOID THE POLICY.

What has heretofore been said in our brief, we believe, answers every contention under this subhead, with the additional observation that in this statement appellants have set up a straw man to knock down. Appellants, instead of basing their argument upon the decision of the court and its Findings, have attacked certain illustrations made by the Court in its opinion. The Court did not find that delinquency in filing the first report voids the policy. This point was not in issue. The Court found that, as evidenced by the Stipulation of Facts, the appellants did file a report on January 3, 1946, and that the honesty clause was applicable to this report. Had the Court found that delinquency in filing the first report voided the policy, the Court, of course, would have found for the appellee

in total and rendered judgment that appellants take nothing.

The same may be said of appellant's argument under the subhead of:

NO REPORT WAS DUE ON THE POLICY IN SUIT UNTIL
AFTER THE FIRE.

This question was not in issue. The appellants did file a report and the authorities cited are not in point. They relate to the computation of time within which an act is to be done, whereas the policy provides that the act is to be done on and as of a certain date, to-wit, the last day of each month of the policy term. Obviously, as the Court points out, December, 1945, was one of the months of the policy term and a report was due as of December 31st of that month, and even with a thirty-day period of grace, would have been delinquent long before February 14, the date of the fire. However, appellants did file a report on January 3, 1946, and consequently were not delinquent, but the decision went not to appellant's acts of omission but was based on their acts of commission.

Appellants' next subhead is:

THE REPORT OF JANUARY 3, 1946, WAS NOT A REPORT
UNDER THE POLICY IN SUIT.

What has heretofore been said in our argument applies equally to this. It was a report filed by the appellants after the issuance of this policy. The Stipulation of Facts specifically agreed to this and the evidence so shows. It was the only report filed by appellants subsequent to the issuance of the policy and prior to the fire, and related to the specific property involved herein. We

have heretofore in this brief quoted the trial Court's expression of opinion on this contention, and will rest on that.

The cases cited on page 29 of Appellants' Brief to the effect that a renewal of a fire policy is a new contract adds nothing to the argument. Although it was stipulated [Tr. 81, f. 6] that this was a renewal policy, no contention one way or the other was based upon that fact. The terms and conditions of the policy in suit are the ones that were applied by the trial Court. Acts and conduct of an assured under a previous policy may and will relate to a renewal thereof, or a policy issued in renewal thereof, and a material representation under a prior connected policy is sufficient to void the policy sued on.

Solomon v. Fed. Ins. Co., 176 Cal. 133, 167 Pac. 859;

Eddy v. National Union Ind. Co. (9th Cir.), 78 F. (2d) 545, 80 F. (2d) 284;

Sun Ins. Co. v. Roy, 1 A. L. R. 17, 67 A. L. R. 618.

The Trial Court considered this contention of appellants and gave the proper answer thereto. This report of January 3, 1946, was a report of values, and the honesty clause relates to any report of values which is the last report of values *prior to the loss*. That this report was false is conceded, and appellants' only complaint is that they are penalized because of this false report.

What has heretofore been said, we believe, answers in detail most of appellants'

SPECIFICATIONS OF ERRORS.

Appellants' first assignment of error goes to Paragraph VII of the Court's Findings of Fact. The answer to this specification is that the Court did not find as stated in the specification, and nothing more can be said. [Tr. 44, f. 37.]

Specifications 2, 3 and 7 go to the questions of law which have already been argued.

Specifications 5 and 6 go to matters not involved in the decision and are answered also by the facts, as shown by the Court's decision, that these Findings and Conclusions were prepared by appellants' counsel, and that appellants neither asked for nor requested Findings on these points.

Specification 4 goes to the Court's denial of motion for a new trial and to open judgment and take additional testimony. Aside from the fact that the matters presented as basis for a new trial were fully considered by the trial Court before decision was rendered, as shown by the Court's opinion [Tr. 35, f. 27], we hardly deem it necessary to call the Court's attention to the well-settled rule that orders denying a new trial are not reviewable on appeal in the absence of a clear abuse of discretion, which has not been shown here.

United States v. Bransen, 142 F. (2d) 232 (9th Cir.).

Or that alleged newly-discovered evidence which would not materially change the result is not ground for a new trial.

Id.

Or that applicant for a new trial is required to rebut the presumption that there has been a lack of diligence.

Id.

Or that the application for a new trial will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been exercised prior thereto.

Id.

It is respectfully submitted that the District Court committed no error against appellants and that the judgment should be affirmed.

Respectfully submitted,

W. W. HINDMAN,

E. EUGENE DAVIS,

Attorneys for Appellee.

No. 11747.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

L. WALLACE and E. B. LANDRY, a copartnership doing
business as FULLERTON MANUFACTURING COMPANY,
Appellants,

vs.

WORLD FIRE AND MARINE INSURANCE COMPANY OF
HARTFORD, CONNECTICUT, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Appellee takes approximately one page of its Brief (pp. 25-6) in discussing the meaning and construction of the pertinent provisions of the policy. It would not appear to be an overstatement to say that appellee does not seriously challenge the construction of the policy contended for by appellants. (Opening Brief, Points III and IV, pp. 14-26.)

Appellee rests its case on two contentions. First, that the District Court erred in finding against appellee on its defense of concealment and misrepresentation, and, second, that the report of January 3, 1946, was a report under the policy in suit, and hence limited appellants' recovery.

I.

The Defense of Concealment and Misrepresentation.

With reference to the question of concealment, there are two complete answers to appellee's contention. In the first place, as pointed out by the District Court in its Opinion [Tr. pp. 36-39] the concealment was immaterial and hence constituted no defense. Since sections 332 and 359 of the California Insurance Code require a concealment or misrepresentation to be material in order to avoid a policy, this holding completely disposed of this defense. And we believe the District Court was correct in so holding. The "Value Reporting" and "Full Reporting" clauses result in diminishing the insurer's liability where there is underreporting, so that rather than being harmed thereby, the insurer actually benefits therefrom. Obviously, these clauses were inserted by the insurer with that very result in mind, and it is therefore fair to state that underreporting is completely immaterial to the insurer. As a matter of fact, the underreporting under the prior policy resulted in a reduction of the limit of liability from \$30,000.00 in the old policy to \$15,000.00 in the new policy, again a matter of benefit to the insurer. As to the question of premium, the insured is required to pay a premium based on the actual values at risk, and with its right of audit the insurer has no difficulty in ascertaining and collecting the full amount due.

And a further and conclusive answer to appellee's contention in this respect is the District Court's specific finding that the underreporting was immaterial. [Findings,

par. IX, Tr. p. 45.] This was a finding of fact and since appellee has not appealed from the judgment, it is now precluded from claiming that this finding was erroneous:

“ ‘Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken’ .”

Morley Co. v. Maryland Casualty Co., 300 U. S. 185.

See also:

Thomas Bishop Co. v. Santa Barbara County (C. C. A. 9), 96 F. (2d) 198.

Concealment and misrepresentation are affirmative defenses to be pleaded and proved by the defendant and before they are effective the trial court must find the facts, including materiality, in favor of the defendant. Since the finding on this issue was adverse to appellee and since appellee has not appealed, in so far as a review of the case by this Court is concerned, the defense should be regarded as if it were not in the case.

II.

The January 3rd Report.

Appellee bases its argument on this point entirely on paragraph VI of the Agreed Statement, ignoring entirely the remarks of Court and Counsel at the trial, the Court's Opinion, the Findings, and the report itself, all of which are referred to in Appellants' Opening Brief (pp. 30-32, 36).

In the first place, paragraph VI of the Agreed Statement makes no mention of the policy in suit, and when it is read in conjunction with paragraph IX, which also refers to the identical report of January 3, 1946, at best the Agreed Statement becomes ambiguous as to just what was intended in so far as reference to the January 3rd report is concerned.

But when the other matters above referred to are considered, as they must be, it seems clear that all parties and the Court understood the reference in paragraphs VI and IX of the Agreed Statement to be to one and the same report, namely the last report of values under the old policy. We particularly call attention to two matters which we believe are controlling in this regard:

1. The following statement in the District Court's Opinion [Tr. p. 35]:

"If plaintiff's contention that the January 3rd report was not made under the new policy is accepted
* * *"

Certainly, the Court would not have so stated, if it had understood the Agreed Statement to mean that the January 3rd report was *actually* by its terms a report under the new policy.

2. The Findings, which leave no doubt that the January 3rd report was filed under the old policy, and was merely *construed* by the Court as limiting the appellants' recovery under the new policy. There are only two references to this report in the Findings. The first is in paragraph VI where it is stated:

“VI.

The Court further finds that the defendant issued a policy of insurance in December, 1944 in the provisional amount of \$30,000 on which a premium was paid. That while said policy was in full force and effect the plaintiffs requested that the provisional limit be reduced to \$15,000, which was accordingly done. *That under said policy of insurance the plaintiffs reported to the defendant at the end of each month the values on hand for the preceding month. That the plaintiffs reported to the defendant on the 31st day of January, 1945 that the actual cash value of the property at the plaintiffs' place of business was \$5000 when as a matter of fact the actual cash value was the sum of \$19,856; * * * and on the 3rd day of January, 1946 plaintiffs reported the cash value of the property as of December 31, 1945 to be the sum of \$2000 when in truth and in fact the actual cash value was, as of December 31, 1945, the sum of \$28,140.72.”*

Here is a definite finding that the January 3rd report was filed under the old policy. Then comes the only other reference to the January 3rd report, to wit, in paragraph VIII of the Findings, as follows:

“VIII.

The Court finds that under the terms and conditions of the policy in effect at the time of the fire the report made on January 3, 1946, determines the liability of the defendant to the plaintiffs and that the

defendant's liability shall be in the proportion that \$2000/28,140.78 X the loss of \$27,253.18 and that the limit of coverage amounts to \$1936.92."

Taking these two references together, it is submitted that the Court found (1) that the January 3rd report was filed under the old policy, and (2) that under the provisions of the new policy, the January 3rd report (which was filed under the old policy), must be regarded as the "last report filed prior to the loss," within the meaning of those words as used in the new policy and hence limited appellants' recovery under the new policy. Even if there be a conflict between the Agreed Statement and the Findings (which appellants do not concede), the Findings would control, and since appellee has not appealed, it is in no position to attack the Findings.

Appellants feel confident that based on the record before it, this Court will conclude that the report of January 3rd was a report under the old policy, and not *actually* a report under the new policy. Whether, having so concluded, this report should nevertheless be held to limit appellants' recovery under the new policy is an entirely different question, which involves a matter of policy construction. (Opening Brief pp. 26-28.) Appellants submit that this case should be decided by this Court on that question of policy construction, and not, as requested by appellee, on an untenable and unfair construction of one paragraph in the Agreed Statement. We feel confident that this Court will not ignore realities and indulge in speculation directly contrary to the actual facts in reaching a decision in this case.

As to the District Court's finding that the January 3rd report, although a report under the old policy, must never-

theless be construed as a report under the new policy and hence limit appellants' recovery, we wish to again emphasize that the point involved is solely one of policy construction, entirely divorced from any question of concealment or misrepresentation. Cases relied on by appellee such as *Atlantic Fruit Co. v. Hamilton Fire Ins. Co.*, 167 N. E. 184; *Rivas v. Gerussi Bros.*, 6 Q. B. D. 222 and the cases cited on page 27 of appellee's brief deal entirely with the question of concealment and misrepresentation, and in no way bear upon the question of *policy construction* involved here. As we have pointed out, there is no issue of concealment before this Court.

Appellants respectfully submit that the decision in this Court should turn on the question of whether a proper construction of this policy permits a finding that the last report of values under the prior policy is to be considered as "the last report of values filed prior to the loss" under the policy in suit. In other words, does the quoted language refer only to reports filed under the policy in suit, or does it also encompass reports filed under a prior policy. Appellants rest their case on the contention that since the two policies are separate and distinct (regardless of whether one is a renewal policy) and since no mention is made in the policy of reports filed under a prior policy, the quoted language can only be construed as referring to reports filed under that policy. To hold otherwise would not only do violence to the language used, but would run counter to well settled rules of construction applicable to insurance policies.

Respectfully submitted,

BENJAMIN J. GOODMAN,
Attorney for Appellants.

